84-1578(1)

Office Supreme Court, U.S.
FILED
APR 4 1985
ALEXANDER L. STEVAS,
CLERK

No.

In The

# Supreme Court of the United States

October Term, 1984

---

ISABEL MOREL DE LETELIER; MICHAEL MAGGIO AS PERSONAL REPRESENTATIVE OF ORLANDO LETELIER; CHRISTIAN A. LETELIER; JOSE J. LETELIER; FRANCISCO J. LETELIER; JUAN PABLO LETELIER; MICHAEL MOFFITT, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF RONNI KARPEN MOFFITT; MURRAY H. KARPEN; AND HILDA KARPEN,

*Petitioners,*

*against*

THE REPUBLIC OF CHILE and LINEA AEREA NACIONAL-CHILE,

*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

William J.T. Brown
(Counsel for Record)
30 Rockefeller Place
New York, New York 10112
(212) 307-4100

Michael E. Tigar
727 East 26th Street
Austin, Texas 78705
(512) 471-5151

John J. Privitera
Samuel J. Buffone
1302 18th Street, N.W. - Suite 603
Washington, D.C. 20036
(202) 785-8911

April 4, 1985

CASILLAS PRESS INC - 1717 K STREET NW WASHINGTON DC - 223-1220

103pp

## QUESTIONS PRESENTED

1. When a court has rejected a foreign state's claim of sovereign immunity from suit on grounds that the state committed tortious acts in the United States of the type denied immunity by section 1605(a)(5) of the Foreign Sovereign Immunities Act ("FSIA"), does that very determination make the resulting judgment unenforceable, even though the judgment creditor demonstrates that some of the state activity on which his claim was based was commercial activity and that the state has assets within our country which were used in such commercial activity?

2. Do intrinsically commercial activities of a foreign state lose their commercial nature and assume a privileged status of immunity if (a) the state has combined them with justiciable but noncommercial activity in order to cause harm in a particular case or (b) the state's purpose in engaging in those commercial activities and combining them with the other justiciable, damage causing activities is political terrorism?

3. If a foreign state has disregarded the separate jural identity of its wholly owned commercial instrumentality, using that commercial operation to carry out a tortious scheme, does the fiction of separate incorporation bar those injured by the scheme from seeking a remedy by execution upon the assets of the very same state owned commercial operation which the state used to cause injury? *See First Nat. City Bank v. Banco para el Comercio (Bancec)*, 462 U.S. 611 (1983).

4. When a foreign state, which is the sole owner of a commercial instrumentality upon which it has purported to confer separate jural status, defaults on discovery

demands served upon it as judgment debtor concerning the question whether it has abused that separate jural status, is a court without discretion to find, as a sanction under Rule 37, Fed. R. Civ. P., that the sovereign owner has in deed abused the alleged jural status of the commercial instrumentality?

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... (i)

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

THE DECISION OF THE DISTRICT COURT ..... 7

THE DECISION OF THE COURT OF APPEALS ..... 8

REASONS FOR GRANTING THE WRIT ..... 10

I. THE COURT OF APPEALS HAS ERECTED NOVEL AND ERRONEOUS BARRIERS TO EXECUTION UPON COMMERCIAL ASSETS UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT ..... 12

A. The Theory that the Kinds of Sovereign Activity Which Result in Loss of Immunity are "Mutually Exclusive" Creates a Technical Trap and Contravenes the Remedial Intent of Congress ..... 12

B. A "Political" or "Terrorist" Purpose does not Alter the Intrinsic Nature of Commercial Activities, nor must the Activities upon which a Claim is Based be Characterized as Wholly Commercial or Wholly Noncommercial ..... 16

II. THE COURT OF APPEALS HAS EXAGGERATED THE PRIVILEGES WHICH A FOREIGN GOVERNMENT CAN OBTAIN BY OPERATING IN THE UNITED STATES THROUGH A WHOLLY OWNED INSTRUMENTALITY ..... 20

Page

A. The Decision Below Failed to Implement this Court's Analysis in *Bancec* ..... 20

B. There is no Justification for Shielding a Wholly Owned Instrumentality from the Consequences of its Owner's Decision to Default Upon Discovery ..... 27

CONCLUSION ..... 30

APPENDIX:

*Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984) ..... 1a

*Letelier v. Republic of Chile*, 567 F.Supp. 1490 (S.D.N.Y. 1983) ..... 21a

*Letelier v. Republic of Chile*, 575 F.Supp. 1217 (S.D.N.Y. 1983) ..... 48a

*Letelier v. Republic of Chile*, Order denying petition for rehearing, January 4, 1985 ..... 54a

Statutory Provisions Involved: 28 U.S.C. § 1602 *et seq.* ..... 56a

## TABLE OF AUTHORITIES


**Cases:** **Page**

*Anderson v. Air West, Inc.*,
542 F.2d 1090 (9th Cir. 1976) ..... 28

*Arango v. Guzman Travel Advisors Corp.*,
621 F.2d 1371 (5h Cir. 1980) ..... 18, 19

*Award Petroleum, Inc. v. Vantage Petroleum Corp.*,
529 F. Supp. 269, 271 (E.D.N.Y. 1981) ..... 21

*Bangor Punta Operations, Inc. v. B.A.R. Co.*,
417 U.S. 703 (1974) ..... 22

*Bank of the United States v. Planters Bank of Georgia*,
22 U.S. (9 Wheat.) 904, 907 (1824) ..... 16

*Berkovitz v. Islamic Republic of Iran*,
733 F.2d 329, 332 (9th Cir. 1984) ..... 14

*Berta v. Long*,
670 F.2d 907 (10th Cir. 1982) ..... 28

*Birch Shipping Corp. v. Embassy of Tanzania*,
507 F. Supp. 311, 313 (D.D.C. 1980) ..... 17

*C.A.B. v. Scottish-American Assoc., Inc.*,
411 F. Supp. 883, 887 (E.D.N.Y. 1976) ..... 21

*Camp v. Gress*,
250 U.S. 308, 320 (1919) ..... 6, 22

*First Nat. City Bank v. Banco para el Comercio (Bancec)*,
462 U.S. 611 (1983) ..... (i), 6, 7, 10, 11, 20, 22, 23, 24

*Gilson v. Republic of Ireland*,
682 F.2d 1022, 1028 (D.C. Cir. 1982) ..... 10

*Hilton v. Guyot*,
159 U.S. 113, 163 (1895) ..... 22, 24

Page

*In Re Uranium Antitrust Litigation,*
617 F.2d 1248 (7th Cir. 1980) ..... 24, 25

*Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,*
456 U.S. 694 (1982) ..... 28

*Letelier v. Republic of Chile,*
488 F. Supp. 665 (D.D.C. 1980) ..... 3, 5

*Letelier v. Republic of Chile,*
502 F. Supp. 259, 266-67 (D.D.C. 1980) ..... 3, 5, 14

*Letelier v., Republic of Chile,*
567 F. Supp. 1490; 575 F. Supp. 1217 (S.D.N.Y. 1983) 2, 3, 7, 8, 21

*Letelier v. Republic of Chile,*
748 F.2d 790 (2d Cir. 1984) ..... 1, *et passim*

*L.R. Schmaus Co. v. C.I.R.,*
406 F.2d 1044 (7th Cir. 1969) ..... 22

*Ministry of Supply, Cairo v. Universe Tankships, Inc.,*
708 F.2d 80, 82 (2d Cir. 1983) ..... 13

*Minton v. Cavaney,*
56 Cal. 2d 576, 364 P.2d 473 (1961) ..... 26

*Motores de Mexicali, S.A. v. Superior Court of Los Angeles,*
51 Cal. 2d 172, 331 P.2d 1 (1958) ..... 26

*Ohio v. Helvering,*
292 U.S. 360, 369 (1934) ..... 16

*Sugarman v. Aeromexico, Inc.,*
626 F.2d 270, 272 (3d Cir. 1980) ..... 13, 16

*Texas Trading & Milling Corp. v. Federal Republic of Nigeria,*
647 F.2d 300 (2d Cir. 1981), *cert. denied,*
454 U.S. 1148 (1982) ..... 12, 19

Page

*Trans World Airlines, Inc. v. Hughes Tool Co.*,
449 F.2d 51, 59 (2d Cir. 1971), *rev'd on other grounds*,
409 U.S. 363 (1973) ..... 27

*Udel v. Udel*,
82 Misc. 2d 882, 370 N.Y.S.2d 426 (Cir. Court 1975) ..... 6

*United Euram Corp. v. U.S.S.R.*,
461 F. Supp. 609, 612 (S.D.N.Y. 1978) ..... 13, 17

*United States v. Sampol*,
636 F.2d 621 (D.C. Cir. 1980) ..... 4

*Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigacion*,
730 F.2d 195 (5th Cir. 1984) ..... 7, 12, 16

**Statutes:**

28 U.S.C. § 1254(1) ..... 2

28 U.S.C. § 1602 ..... 2, 4, 15
28 U.S.C. § 1603 ..... 2, 7, 9, 19

28 U.S.C. § 1605(a) ..... 2, 4, *et passim*

28 U.S.C. § 1606 ..... 2, 3, 11, 24, 25, 28

28 U.S.C. § 1608(e) ..... 5

28 U.S.C. § 1610(a) ..... 2, 7, *et passim*

28 U.S.C. § 1610(b) ..... 26

28 U.S.C. § 1963 ..... 6

Fed. R. Civ. P. Rule 37 ..... 8, 28

Fed. R. Civ. P. Rule 69 ..... 6

Page

C.P.L.R. 5228 ..... 6

**Other Authorities**

A.L.I. Restatement of the Law, Foreign Relations Law of the United States (revised) § 445, Tent. Draft No. 5, April 5, 1984 ..... 5

H.W. Ballantine, Ballantine on Corporations § 1 (Rev. Ed. 1946) ..... 22

A.A. Berle, The Theory of Enterprise Liability, 47 Colum. L. Rev. 343, 352 (1947) ..... 22

1 W.M. Fletcher, Cycolopedia of the Law of Private Corporations § 41 (rev. perm. ed. 1974) ..... 21

H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604-6631 ..... 7, 14, 15, 25, 28

H.R. Rep. No. 96-1157, 96th Cong. 2d Sess. (1980) ..... 3

R. Von Mehren, The Foreign Sovereign Immunities Act of 1976, 17 Col. J. Trans. L. 33, 53 (1978) ..... 19

6 Weinstein-Korn-Miller, New York Civil Practice § 5228.04 ..... 6

In The

# Supreme Court of the United States

October Term, 1984

---

No. -

---

ISABEL MOREL DE LETELIER; MICHAEL MAGGIO AS PERSONAL REPRESENTATIVE OF ORLANDO LETELIER; CHRISTIAN A. LETELIER; JOSE J. LETELIER; FRANCISCO J. LETELIER; JUAN PABLO LETELIER; MICHAEL MOFFITT, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF RONNI KARPEN MOFFITT; MURRAY H. KARPEN; AND HILDA KARPEN,

*Petitioners,*

*against*

THE REPUBLIC OF CHILE and LINEA AEREA NACIONAL-CHILE,

*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 20, 1984.

## OPINIONS BELOW

The Second Circuit opinion, reported at 748 F.2d 790 (1984), is set forth in the appendix. App. 1a. The prior opinions of the United States District Court for the Southern District of New York, which were reversed by the Second Circuit, are reported at 567 F. Supp. 1490 and

575 F. Supp. 1217 (1983) and are set forth in the appendix. App. 21a; 48a.

## JURISDICTION

The judgment of the Second Circuit was initially entered on November 20, 1984. A timely petition for rehearing was denied on January 4, 1985. App. 54a. This petition for certiorari is filed within ninety days thereafter. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The case involves the relationship between the provisions of the Foreign Sovereign Immunities Act of 1976 ("FSIA") which authorize suit against foreign sovereigns (28 U.S.C. § 1605) and those which authorize execution of judgment. § 1610. It also involves the FSIA's declaration of purpose (§ 1602), its definitional section (§ 1603), and the section governing the extent of substantive liability. § 1606. Reprinted. App. 56a.

## STATEMENT OF THE CASE

This was a proceeding in the United States District Court for the Southern District of New York for enforcement of a judgment for damages against the Republic of Chile, originally entered in the United States District Court for the District of Columbia. For proceedings leading to the original entry of judgment, *see Letelier v. Republic of Chile,* 488 F. Supp. 665 (D.D.C. 1980); *Letelier v. Republic of Chile,* 502 F. Supp. 259 (D.D.C. 1980).[1]

[1]The Court of Appeals for the Second Circuit erred (748 F.2d at 792) in suggesting that the judgment against Chile included "punitive damages." Section 1606 of the FSIA permits no award of punitive damages against a foreign state (other than an agency or instrumen-

The judgment is based upon a wrongful scheme in which the Chilean state, by its agents, used its power as sole owner of the Chilean state airline to induce airline personnel to lend commercial assistance to a government mission which was conducted on our territory in 1976. While the assistance was essential to success of the mission, petitioners maintain (and the enforcing district court found, App. 42a-43a; 567 F. Supp. at 1501-02) that it was essentially "commercial" in nature. The services included issuance of tickets, sometimes on credit; transport of passengers; assistance by pilots in hand-carrying packages; and making the first class lounge available for meetings at JFK airport; but the tickets were issued in false names, the passengers were assassins, some of the packages contained explosives or bomb components, and the meetings concerned an assassination plot. *See Alleged Violations of U.S. Aviation Laws and Regulations by LAN-Chile Airlines,* H.R. Rep. No. 1157, 96th Cong., 2d Sess. (1980); App. 25a-26a.

It is uncertain whether any airline personnel knew the precise purpose of the scheme or that they were being used to transport explosives; but it is undisputed that they knew the travelers to whom they were lending those services were Chilean government officials.[2] In demanding such

---

tality of a foreign state) and none was made against Chile. *See Letelier v. Republic of Chile,* 502 F. Supp. 259, 266-67.

[2]The airline's assistant station chief for New York, Cruchaga, admitted to a Congressional sub-committee and to the Grand Jury that he had believed the convicted agent was "an official of the government", (JA 465. "JA" refers to the Joint Appendix filed in the Court of Appeals together with the Supplemental Joint Appendix, hereinafter "SJA"), "part of the government of Chile . . ." JA168.

services Chilean agents committed an intolerable abuse of the arm's-length relationship which should have been maintained between the Chilean secret police ("DINA") and the state airline, which purports to operate in our territory as a separate jural person.

The scheme culminated in an explosion in an automobile in Sheridan Circle during the morning rush hour of September 21, 1976, which killed Mrs. Ronni Moffitt, an American woman, and Orlando Letelier, a former Chilean ambassador who had been given refuge in this country, and caused severe injury to Ronni Moffitt's husband, petitioner Michael Moffitt.

Following a federal investigation, the United States called on Chile to extradite a number of officials or operatives, including General Contreras, the head of DINA. While Chile indicated that it had cashiered Contreras and others, (SJA 28) it refused to extradite the responsible officials, with the sole exception of DINA operative Michael Vernon Townley (a/k/a "Silva" or "Andres Wilson"), a bilingual U.S. citizen who had lived in Chile since childhood. Townley admitted his role in the affair, pleaded guilty, and testified against some of the culprits he had helped to recruit for Chile. *See United States v. Sampol,* 636 F.2d 621 (D.C. Cir. 1980).

Petitioners commenced their civil action against Chile in 1978, alleging jurisdiction generally under FSIA §§ 1602-1611 (JA 415) and asserting that § 1605(a)(5) provided a specific ground for denying Chile immunity. While Chile had co-opted the commercial activities of its airline in furtherance of the scheme, petitioners' claim was not solely based on those commercial activities. It concerned a tort not fully "encompassed" in the commercial category, committed in the United States, and which Chile was without

discretion to undertake. § 1605(a)(5). Chile defaulted; but it fully briefed the issue of sovereign immunity from suit by submission of notes through the diplomatic channel. *See Letelier,* 488 F. Supp. at 668-69; 567 F. Supp. at 1494; App. 23a. After the hearing mandated by FSIA § 1608(e), the District Court for the District of Columbia concluded that § 1605(a)(5) denied Chile immunity from suit in connection with its tortious scheme, there being no "discretion" to commit acts of terrorism in the United States. *Letelier,* 488 F.Supp. 665, 673.[3] In a subsequent opinion, that court also noted the involvement of commercial operations in the scheme, holding that "[u]ncontradicted testimony demonstrated that facilities and personnel of LAN Chile Airlines, a foreign air carrier owned and operated by the government of Chile were used by [Chilean agent] Townley in connection with the preparation and carrying out of the assassination of Orlando Letelier and Ronni Moffitt." *Letelier,* 502 F. Supp. at 262. Since jurisdiction was clear under § 1605(a)(5), however, there appeared to be no need to determine whether it could otherwise have been sustained under § 1605(a)(2).

Chile took no appeal and petitioners registered their judgment (28 U.S.C. § 1963) in the United States District Court for the Southern District of New York and sought to enforce it there pursuant to Rule 69, Fed. R. Civ. P., as it incorporates a New York State procedure for enforcement of judgments, CPLR § 5228. Section 5228 calls for appointment of a receiver to collect and dispose of property interests of a judgment debtor, a procedure deemed suitable when such interests may be encumbered by other claims. *See* 6 Weinstein-Korn-Miller, New York Civil

[3]That view has since been endorsed by scholarly authority. *See* A.L.I. Restatement of the Law, Foreign Relations Law of the United States (revised) § 445, Tent. Draft No. 5, April 5, 1984.

Practice § 5228.04. Here the property interest sought to be attached was the ownership interest of Chile in commercial United States assets of its state airline operation – the very assets and facilities which Chile had used in implementing its wrongful scheme.

To establish that Chile had an ownership interest in assets held in the name of its wholly-owned state airline, petitioners pointed out that Chile, as sole owner of the airline, was the indirect or "equitable" owner of its assets (*e.g., Camp v. Gress,* 250 U.S. 308, 320 (1919)) and under New York law the receiver stands in the judgment debtor's shoes to gain access to assets of his wholly owned subsidiary. *Udel v. Udel,* 82 Misc. 2d 882, 370 N.Y.S.2d 426 (Cir. Court 1975). Petitioners also contended that if necessary for levy, the separate personality of the airline should be disregarded in application of principles laid down by this Court in *First National City Bank v. Banco para el Comercio Exterior de Cuba* (hereinafter "*Bancec*"), 462 U.S. 611 (1983), since there is substantial evidence that the Chilean government itself treated the airline as a mere tool both on a regular basis and in the very incidents which gave rise to judgment.

As regards sovereign immunity from execution, Chile and its instrumentality bore the burden of establishing such defense. H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1976) reprinted in 1976 U.S. Code Cong. and Ad. News 6604-6631. (hereinafter H. Rep.) 17. *Vencedora Oceanica Navigacion S.A. v. Compagnie Nationale Algerienne de Navigacion,* 730 F.2d 195, 199 (5th Cir. 1984). Petitioners pointed out that while their claim may not have been wholly "encompassed" in the commercial category (*see* § 1605(a)(5)), it had nonetheless been based in part on commercial airline activities and FSIA § 1610(a)(2) therefore denied the Chilean state (including its airline in-

strumentality, *see* § 1603(a)) immunity from execution upon assets used in the commercial activities on which their claim was in part based.

## THE DECISION OF THE DISTRICT COURT

In a carefully reasoned opinion, Hon. Morris M. Lasker found that there was "nothing logically inconsistent" in petitioners' contention that airline assets had been used in activity that was both tortious and commercial. App. 37a, 567 F. Supp. at 1499. He held that petitioners' claim had indeed been sufficiently connected with Chile's commercial activity to be deemed based in part on those activities (App. 46a) and therefore concluded that state airline assets lacked sovereign immunity. Applying the analysis of *Bancec, supra,* he held that equitable principles would require disregard of the fictional airline entity if Chile had abused the alleged separate existence of the entity and used airline assets in furtherance of its scheme. App. 30a, 567 F. Supp. at 1496. He held that, even in the absence of any discovery, petitioners had made a "considerable" (App. 32a, 567 F. Supp. at 1497) or "threshhold" (App. 31a, 567 F. Supp. at 1496) showing, based on admissible evidence (App. 31-32a, 567 F. Supp. at 1496-97) that Chile had in fact abused the airline entity, and he ruled that in seeking to develop the record more fully petitioners should have the benefit of discovery from Chile itself (App. 32a, 567 F. Supp. at 1497), which best knows the extent to which its officials abused normal corporate structures and chains of command.[4]

---

[4]The affidavit which the airline offered on the point was simply bland denial (JA 360-62, 565-66, 640-41, 645) by an official who admitted he was not even employed by the airline at the time in question. JA 558. Counsel for the airline has conceded (Reply Brief of Garnishee/Appellant below at 9 n. 11) that this valueless affidavit was the "evidence" which the airline offered on the point.

Thereafter petitioners sought discovery from Chile, which again defaulted. Pursuant to Rule 37, Fed. R. Civ. P., the District Court then imposed sanctions against Chile which took the form of findings of fact as to Chile's abuse of the alleged jural personality of its airline. App. 48a. These findings, together with petitioners' prior showing, led to the conclusion that Chile was not entitled to have its wholly-owned airline entity treated as a separate jural person. No creditors of the airline entity appeared to assert prior claims. The court appointed judgment creditor Michael Moffitt as receiver for the United States assets of the airline. To prevent his execution of those functions, the Chilean authorities appealed and posted a supersedeas bond in an amount sufficient to pay the judgment.

## THE DECISION OF THE COURT OF APPEALS

Describing the matter before it as a "hard" case (App. 2a), the Second Circuit reversed, holding that the exceptions to sovereign immunity from suit set forth in § 1605(a)(2) and (a)(5) are "mutually exclusive." Since the District Court in the District of Columbia had lifted jurisdictional immunity based on its finding that the activities complained of were tortious and adjudicable under § 1605(a)(5), the Court of Appeals thought it would be "inconsistent" for an enforcing court to lift execution immunity based on a finding that the claim was also based (in part) on commercial activity. App. 12a. Thus, in the Court of Appeals' view, a finding of § 1605(a)(5) jurisdiction entails an implicit finding that a claim is not "encompassed" within the rubric of commercial activities, which, in turn, requires that all the activities upon which the claim is based should perforce be deemed noncommercial — even though the court which originally entered the judgment

never reached the question whether the petitioners' claims were partially based on commercial activity and, indeed, noted the involvement of airline activities in the wrong complained of. The Court of Appeals acknowledged that the "purpose" of airline personnel in lending assistance was not relevant under § 1603(d), App. 14a, but then concluded that a "political motivation" or "complicity" in an assassination plot would take otherwise commercial activity out of the commercial domain and give it a political character. Asserting that petitioners had described political terrorism as the motive for the wrongful scheme, the court opined that the purpose of airline personnel in allowing their services to be co-opted by Chilean government officials was also necessarily political (App. 16a) — unless, as the court inconsistently suggested, the purposes were those of a "social relationship" between airline personnel and Chilean agents. App. 10a. Assuming these two alternative purposes (which had never been tested by discovery), the court concluded that, despite the apparent commercial nature of the services rendered, they could not be deemed commercial. On the question whether Chile had any ownership interest in airline assets, the Court of Appeals disregarded the cases which have held that the sole owner of a corporation is also the equitable owner of its assets. It held that the Chilean agents' use of airline personnel to carry out the wrongful scheme was not the kind of abuse of the airline's jural identity which would justify a court's disregarding that identity as in *Bancec*. App. 9a. Conceding that petitioners should ordinarily be entitled to discovery to justify disregarding the fictional entity, the Court denied that right here because it found that petitioners could never overcome the essentially political (rather than commercial) nature of the activities of which they complained. App. 20a. In a footnote, the court held

that despite Chile's refusal to make discovery as to its abuse of the airline's jural identity, it had been error to sanction that default with a finding that Chile committed such abuse, since such a finding would result in transfer of Chile's ownership interest in airline assets to its creditors and would thus have an adverse impact upon the airline. According to the Court of Appeals, a sanction of this type could be permitted only if it were shown that the airline "controlled" the Chilean state. App. 11a n. 2.

## REASONS FOR GRANTING THE WRIT

The Second Circuit has interpreted the FSIA provisions authorizing adjudication and execution as a rigidly symmetrical structure of "mutually exclusive" categories, creating formalistic barriers to execution upon the commercial assets of foreign sovereigns. This mechanistic, pseudological approach contravenes the remedial intent of Congress as expressed in the FSIA. It also conflicts with the call of the District of Columbia Circuit for a "more open-textured reading of the Act." *See Gilson v. Republic of Ireland,* 682 F.2d 1022, 1028 (D.C. Cir. 1982). The question whether exercise of jurisdiction to adjudicate on one basis (§ 1605(a)(5)) artificially disqualifies the resulting judgment from execution on another basis which would otherwise be available (§ 1610(a)(2)) is an important matter which should be decided by this Court at the earliest opportunity, so as to advise claimants against foreign governments, as well as the lower courts, whether adjudication on grounds of § 1605(a)(5) should be avoided as a declaration of liability which in fact gives the wrongdoer immunity from execution, regardless of the basis for the claim.

The Second Circuit's theory that an admixture of

political activity or "terrorist" purpose in otherwise commercial activity makes the entire combination of conduct "noncommercial" raises other questions of equal importance. Can a foreign government really gain immunity from execution by claiming that its commercial deeds were performed with "political" purpose? Can it really combine two forms of nonimmune conduct – commercial conduct and tortious conduct in the United States – in order to create an immunity from execution which would not exist if it had limited its wrongful conduct to the commercial sphere?

The Second Circuit failed to implement the analysis which this Court set forth in *Bancec* regarding the circumstances in which the liability of a foreign state shall cause adverse economic consequences for its wholly-owned instrumentalities. It has absurdly exaggerated the privilege which a foreign state may obtain by operating in the United States as a separate jural entity. May a foreign state cause injury in the United States by improperly manipulating the commercial operation of its wholly-owned instrumentality and then deny that it has a property interest in the commercial assets of such wholly owned instrumentality, despite the rule of FSIA § 1606? The Second Circuit decision creates novel immunities and privileges for foreign states which are not justified by history or by the policies upon which the doctrines of sovereign immunity and separate incorporation are based.

The questions presented arise under a statute, the FSIA, which Congress has given the Federal Judiciary a special mandate to interpret and which has vital importance in the relationships between our people and foreign states. However, courts have described the FSIA as "vaguely worded," *Texas Trading v. Federal Republic of Nigeria,* 647 F.2d 300, 302 (2d Cir. 1981) *cert. denied,* 454 U.S. 1148 (1982);

and "a peculiarly twisted exercise in statutory draftsmanship," *Vencedora Oceanica, supra,* 730 F.2d at 205 (Higginbotham, J., concurring in part, dissenting in part). The statute's execution provisions, and their relationship to the adjudication provisions, remain *terra incognita,* rendered the more obscure and inaccessible by the Second Circuit's decision. The issues raised call for prompt review by this Court.

## I. THE COURT OF APPEALS HAS ERECTED NOVEL AND ERRONEOUS BARRIERS TO EXECUTION UPON COMMERCIAL ASSETS UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

### A. The Theory that the Kinds of Sovereign Activity Which Result in Loss of Immunity are "Mutually Exclusive" Creates a Technical Trap and Contravenes the Remedial Intent of Congress

FSIA § 1605(a) sets forth five grounds upon which a foreign state may lose its immunity from suit and it is obvious that those grounds may overlap in a particular case. Thus a state may have waived its immunity (§ 1605(a)(1)) in respect of a claim based on its commercial activity (§ 1605(a)(2)), which also involves the kind of property referred to in §§ 1605(a)(3) and (4), and, indeed, where the commercial activity entailed a domestic tort adjudicable pursuant to § 1605(a)(5). Of the five provisions, sections (2) and (5) both cause loss of immunity due to the kind of conduct on which the claim is based, and the overlap between these two categories of conduct is evident. Thus, section (2) permits suit where a claim is "based upon a commercial activity . . . or upon an act performed . . . in connection with a commercial activity" and there is an appropriate nexus to the United States. Section (5) permits suit for money damages "for personal injury or death, or damage to or loss of prop-

erty, occurring in the United States and caused by the tortious act or omission" of a foreign state. A glance at section (2) might leave one in doubt whether claims "based on commercial activity" were meant to include tort as well as contract claims or whether all tort claims were to be subject to the more stringent territorial and other limitations of section (5). *Compare, e.g., Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 272 (3d Cir. 1980) with *Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80, 85 (2d Cir. 1983). Perhaps to obviate any doubt in this regard Congress inserted a prefatory clause in section (5) making clear that tort claims based on commercial activity were to be brought under the more liberal conditions of section (2). Thus, paragraph (5) and its limitations are applicable only to claims "not otherwise encompassed in paragraph (2)." *United Euram Corp. v. U.S.S.R.*, 461 F. Supp. 609, 612 (S.D.N.Y. 1978). The Court of Appeals has now turned the liberal intention of Congress on its head, holding that since the original trial court found that it had jurisdiction to decide petitioners' claim under the more stringent standard of section 1605(a)(5), this necessarily implies a finding that the claim was not even partially based upon commercial activities. However, Congress surely intended no such implication. It is quite reasonable to construe the term "otherwise encompassed" as allowing plaintiffs to sue under § 1605 (a)(5) upon tort claims which are based in part on commercial activity of a sovereign but are not wholly "encompassed" in the commercial rubric. Encompass means "to encircle, surround, bound on all sides." Although the instant case presented commercial aspects, it plainly went beyond the commercial sphere and its basis in tort seemed a more obvious ground for jurisdiction both to the trial judge and the claimants. Once a court has found a ground for jurisdiction it is not usually required to determine exhaustively what

alternative grounds may exist. The adjudicating court never determined implicitly or otherwise that petitioners' claim was not based on any commercial activities. To the contrary, it explicitly found that Chilean agents had used facilities of the airline in carrying out their scheme. *See Letelier*, 502 F. Supp. at 262, quoted *supra*.[5]

FSIA legislative history makes clear that Congress did not intend to force litigants at the adjudication phase to make a choice of jurisdictional basis that would subsequently operate as an election of remedy (or nonremedy) at the execution phase. Thus, "commercial activities encompassed by section 1605(a)(2)" are said to be "included" as a basis for levy under section 1610(a)(2), but the House Report listed other cases where there could be levy based on commercial activity despite prior adjudication on another basis.

> "The provision also includes a commercial activity giving rise to a claim with respect to which the foreign state has waived immunity under section 1605(a)(1). In addition, it includes a commercial activity which gave rise to a maritime lien with respect to which an admiralty suit was brought under section 1605(b)." H. Rep. 28

---

[5]The claim might well have been adjudicable pursuant to § 1605(a)(2). It could be described as a claim based in part on commercial activity in the United States or based on a justiciable tort carried out in the United States in connection with commercial activity, and, therefore, a claim based on an "act in the United States in connection with commercial activity elsewhere" (since the relevant commercial activity occurred both in the United States and elsewhere). The legislative history suggests that the "act" in connection with § 1605(a)(2) commercial activity must be justiciable but does not itself have to be commercial (should be "commercial or private in nature" — H. Rep. 19). In *Berkovitz v. Islamic Republic of Iran*, 733 F.2d 329, 332 (9th Cir. 1984), the Ninth Circuit raised the question, but did not decide, whether the "act" in connection with commercial activity could be murder.

Congress was therefore well aware that the question whether a claim had been based on commercial activity would often be decided in enforcement proceedings rather than trial. *Id.* Chile had full opportunity to litigate the issue at that stage and again chose to default.[6]

The Second Circuit also erred in suggesting that Congress had an affirmative intent to ensure that any remedy under § 1610 would be only partial. App. 17a-19a. Congress was aware that it was not creating a complete remedy in § 1610 and may not have contemplated all possible permutations of commercial and noncommercial activities — or the possibility that a sovereign would use commercial activities to accomplish a terrorist attack. But the denial of execution immunity to assets used in sovereign commercial activity which gives rise to a claim was one of the principal objectives of the statute (*see* § 1602 and H. Rep. at 8), implementing the most basic notions of what justice should demand when a sovereign enters the commercial arena (*see, e.g., Bank of the United States v. Planters Bank of Georgia,* 22 U.S. (9 Wheat.) 904, 907 (1824); *Ohio v. Helvering,* 292 U.S. 360, 369 (1934)) and causes injury through justiciable conduct within our territory. Petitioners submit that in light of that purpose the Second Circuit should have avoided an ar-

---

[6]Although there is a verbal similarity between the five subsections of the adjudication paragraph, § 1605(a), and the five subsections of the execution paragraph, § 1610(a), there is no support whatever for the mechanistic notion that having established the right to sue under one subsection one can only execute the resulting judgment under the related subsection. It is indisputable, for example, that in a case where jurisdiction to sue is premised on "commercial activity" pursuant to § 1605(a)(2), a judgment creditor could levy pursuant to § 1610(a)(5) upon an insurance policy protecting against that commercial loss. Congress clearly wrote the latter provision in general terms to cover not just policies of automobile insurance but also "other liability or casualty insurance covering the claim." § 1610(a)(5).

tificially restrictive interpretation which frustrates that purpose.

The Second Circuit did not disturb Judge Lasker's finding (App. 43a-46a) that petitioners' claim was in fact "based" in part on the relevant activities of airline personnel. This finding seems incontestable since airline activity was an essential causal link in the harm which occurred. Moreover, the cases establish that a claim is based on commercial activity in the United States so long as there is a "nexus" between an act causing damage elsewhere and a course of business activity being conducted in the United States. *E.g., Vencedora Oceanica, supra,* 730 F.2d 195; *Sugarman v. Aeromexico, Inc.,* 626 F.2d 270 (3rd Cir. 1980).[7] In elaborating its theory of mutual exclusivity, however, the Second Circuit has held that it does not matter whether a claim is based on commercial activity; if it has been adjudicated pursuant to § 1605(a)(5) it simply cannot be enforced. Such an approach turns a remedial statute into a technical trap and calls for review by this Court.

### B. A "Political" or "Terrorist" Purpose Does Not Alter the Intrinsic Nature of Commercial Activities, Nor Must The Activities Upon Which a Claim is Based Be Characterized as Wholly Commercial or Wholly Noncommercial

The statute does not speak of "commercial" claims and "noncommercial" claims, but rather of claims "based on commercial activity" (or "upon an act in connection with

[7]Petitioners note that the statute uses the phrase "in connection with" commercial activity. § 1605(a)(2). It would seem axiomatic that if a claim is adjudicated pursuant to the second or third subclause of § 1605(a)(2) as "based on an act in connection with commercial activity" the resulting judgment is deemed to be one "in connection with" (see § 1602) and "based" on that commercial activity for purposes of execution pursuant to § 1610(a)(2).

commercial activity") (§ 1605(a)(2)) and those "not otherwise encompassed." § 1605(a)(5). Immunity from suit is lost because the sovereign has engaged in commercial activity which bears an appropriate nexus to the injury – and the sovereign cannot clothe his commercial activity with immunity by accompanying it with parallel, noncommercial acts. *See Birch Shipping v. Embassy of Tanzania,* 507 F. Supp. 311, 313 (D.D.C. 1980) (if government bank account is sometimes used for commercial needs, its use on other occasions for governmental purposes does not render it immune from attachment). The Court of Appeals believed that all of the activities on which a claim is based must be deemed commercial "as a whole" (App. 14a) for execution to take place on related commercial assets, but such unitary characterization of the activity on which a claim is based is not mandated by the statute.[8] Clearly a claim may be based in part on both commercial and noncommercial activities. Thus, if a foreign ambassador at the wheel of his car and the driver of a commercial tour bus owned by his government race upon the highway and overrun a pedestrian, the foreign sovereign may surely be sued for the misconduct of both under Section 1610(a)(5), because although the claim involves some commercial activity (tour bus) it is not wholly "encompassed" thereby, since the ambassador's own tortious activity was not itself "commercial." It would surely flout the intent of Congress

---

[8]The Court of Appeals emphasized a passage from the FSIA legislative history indicating that the AID programs should not be deemed commercial (App. 13a-14a) but this should not be read as conferring a blanket immunity on commercial activities associated with AID programs. As District Judge Pollack has pointed out, "a transaction to obtain goods or services from private parties would not lose its otherwise commerical character because it was entered into in connection with an AID program." *United Euram Corp. v. U.S.S.R., supra,* 461 F. Supp. 609, 611.

to hold that the resulting damage judgment cannot be executed upon the assets of the commercial tour bus activity which formed part of the basis of the claim. Similarly, in the instant case the claim was based upon a broad scheme involving the justiciable noncommercial activity of secret agents but also the purely commercial activity of airline personnel who provided essential commercial services at the bidding of Chilean officials.

The Second Circuit placed principal reliance (App. 16a) on *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980), but the Fifth Circuit's analysis in that case confirms the point that commercial and governmental activity can exist side-by-side and jointly give rise to a single claim. Plaintiffs in *Arango* stated claims based on conduct by the Dominican State airline which resulted in hardship and the frustration of their vacation plans, and the Fifth Circuit held that certain aspects of airline conduct were not commercial, such as the action of airline personnel in forcing passengers to reboard the aircraft in Santo Domingo at the direction of immigration officials. Other aspects were deemed commercial, such as selling tickets in Miami with knowledge that the passengers would be forced back on the aircraft once they reached Santo Domingo. Plaintiffs therefore had a cause of action against the airline, not for assault and battery, but for tortious commercial activity which resulted, *inter alia,* in assault and battery. The Fifth Circuit has thus rejected any notion that involvement of some noncommercial activities makes the entire claim "noncommercial." 621 F.2d at 1378-81.

To sidestep the point that commercial and noncommercial activity can jointly give rise to the same claim, the Second Circuit resorted to an irrelevant "either-or" hypo-

thesis: either airline personnel were "politically motivated" participants in a murder plot, in which case their activity was not commercial (App. 16a); or airline personnel were merely helping friendly DINA agents for social reasons. (App. 10a). Petitioners emphatically reject such speculation about purpose. As Judge Lasker found, the services rendered were "commercial" in nature. Purposes of politics or friendship are irrelevant, since the statute specifically provides that the *nature* of the particular activity or acts is determinative, *not* the purpose. 28 U.S.C. § 1603(d). *See, e.g., Texas Trading & Milling Corp. v. Federal Republic of Nigeria,* 647 F.2d 300, 310 (2d Cir. 1981), *cert. denied,* 454 U.S. 1148 (1982); *See* R. Von Mehren, The Foreign Sovereign Immunities Act of 1976, 17 Col. J. Trans. L. 33, 53 (1978) ([T]here is no logical necessity for making the categories of "commercial acts" and "political and public acts" mutually exclusive. Thus, in adopting the commercial act standard for nonimmunity coupled with the nature test for defining commercial acts, it would seem that Congress intended to provide for jurisdiction with respect to all commercial acts by foreign sovereigns, even if those acts were 'political and public acts' . . . .).

The Court of Appeals erred in stating that if the airline was "in complicity" with the Chilean secret police, "its activities had nothing to do with its place in commerce." App. 12a. To the contrary, the degree of "complicity" is irrelevant and the airline's activities had everything to do with its place in commerce. It was the use of that normal "place in commerce" that permitted Chile to carry out its scheme.

A justiciable tort characterized as terrorism is surely entitled to no greater privileges or immunities than negligent

transport of explosives or assault and battery, both of which were charged in the complaint. JA 418. To offer the least indulgence to such an incident as "politically motivated" (App. 16a) is to reward excess and to undercut the forces of moderation which may exist even within extremist governments.

## II. THE COURT OF APPEALS HAS EXAGGERATED THE PRIVILEGES WHICH A FOREIGN GOVERNMENT CAN OBTAIN BY OPERATING IN THE UNITED STATES THROUGH A WHOLLY OWNED INSTRUMENTALITY

### A. The Decision Below Failed to Implement This Court's Analysis in *Bancec*.

Acknowledging that *Bancec* deserved "close scrutiny" because of its "conceptual framework" (App. 7a), the Court of Appeals characterized that opinion as holding that "a foreign state instrumentality is answerable just as its sovereign parent would be if the foreign state has abused the corporate form, or where recognizing the instrumentality's separate status works a fraud or an injustice." App. 8a. Applying that principle, however, the Court of Appeals held that it was not an abuse of the corporate form — or not the right "sort of 'abuse' " — for Chile to have used facilities and personnel of the state airline to plan and carry out its scheme. App. 9a. According to the court, this kind of abuse merely meant that the airline, *qua* entity, had become a joint tortfeasor. (Presumably, in the court's analysis, intercorporate abuse of this type works no "fraud or injustice" because the instrumentality, as a joint tortfeasor, may itself be sued for the wrongs it has been caused to commit.)

The error in the court's analysis is two-fold: first, it is not at all clear that the airline, *qua* entity, *was* a joint tort-

feasor. While airline personnel undoubtedly knew they were aiding Chilean government officials in one or more government missions, their complicity may not have extended beyond such knowledge. Since Chile defaulted at both the trial and enforcement stages and has refused all discovery (and because the airline itself made no discovery), we simply cannot be sure. Second, the sort of intercorporate abuse demonstrated by Chile is indeed the kind which traditionally results in a piercing of the corporate veil. The significance of District Judge Lasker's findings is that Chile, by its agents, had induced airline personnel to peform commercial functions which were *ultra vires* the corporate purposes of the airline and served the interests of the airline's owner, not the airline. *See* App. 30a, 567 F. Supp. at 1496. In effect, Chile used its airline instrumentality "as a vehicle of convenience for transactions which in fact are personal" to Chile. *Award Petroleum, Inc. v. Vantage Petroleum Corp.*, 529 F. Supp. 269, 271 (E.D.N.Y. 1981); *see C.A.B. v. Scottish-American Assoc., Inc.*, 411 F. Supp. 883, 887 (E.D.N.Y. 1976); IW.M. Fletcher, Cyclopedia of the Law of Private Corporations, § 41.10 (rev. perm. ed. 1974), 397 ("uses a corporation merely as an instrumentality to conduct his personal business"). Whether or not the airline, as an entity, had sufficient complicity to be deemed a joint tortfeasor, Chile as the airline's owner made airline personnel its agents for purposes of furthering the scheme, and Chile bears responsibility for the resultant acts of airline personnel — witting or unwitting. Chile itself disregarded the separate corporate vocation of its airline and cannot now recreate that barrier to deny petitioners a remedy.

The result attained by District Judge Lasker is fully supported by this Court's analysis in *Bancec*. First, whether Chile's investment in United States operations of its airline

can be reached by Chile's creditors in this case is a matter not of Chilean law but of federal common law. *Bancec,* 462 U.S. at 621-23. *See Hilton v. Guyot,* 159 U.S. 113, 163 (1895). Second, in the private context, United States courts have long recognized that "a corporation is at bottom but an association of individuals united for a common purpose and permitted by law to use a common name." A.A. Berle, The Theory of Enterprise Liability, 47 Colum. L. Rev. 343, 352 (1947). It "is not to be regarded as legally separate from its owners in all circumstances." *Bancec,* 462 U.S. at 629. Third, there has never been any question in this case of "freely ignoring" corporate structures. *See Bancec,* 462 U.S. at 626. The main privilege of incorporation has always been that of limited liability — *i.e.,* shareholders are not held liable for the debts of their corporation beyond the limited amount of their investment. *See, e.g.,* H.W. Ballantine, Ballantine on Corporations, § 1 at 4 (Rev. Ed. 1946). Nor, of course, is the corporation directly liable for the debt of its shareholders, even though they are the equitable owners of its assets and can, subject to the rights of corporate creditors, dispose of the corporation and its assets as they please. *E.g., Camp. v. Gress,* 250 U.S. 308, 320 (1919); *L.R. Schmaus Co. v. C.I.R.,* 406 F.2d 1044 (7th Cir. 1969); *see Bangor Punta Operations v. Bangor & Aroostook Ry.,* 417 U.S. 703 (1974). In this case there has never been any question of denying Chile the privilege of limited liability in connection with the debts of its airline. Nor is it necessary to impute to the airline a liability for misdeeds of Chile.

*Bancec* concerns the question of imputing a liability of the sole shareholder to his corporation. In that case, this Court decided in the context of § 1605 — exceptions to immunity from suit — to disregard the separate jural personality of a Cuban government entity which had ap-

peared in our courts to assert a claim. Three results flowed from that decision. First, our courts could deem that Cuba itself had appeared, thus submitting to jurisdiction. Second, a liability of Cuba could be imputed to the appearing entity, thus permitting set-off against amounts claimed by the appearing entity. Third, since the appearing entity was deemed to have no jural personality of its own, the set-off was not subordinated to the claims of the entity's own creditors, *i.e.*, third parties who might have extended credit to the enterprise were in no better position than creditors of its owner.

Petitioners respectfully submit that authorization of levy in the present circumstances is far less drastic than the result in *Bancec* and will not shock the jural expectations of the airline entity or its creditors. Our courts gained jurisdiction to adjudicate the claim against the parent state because of Chile's own acts in our territory — jurisdiction did not spring into being just because a state enterprise sought to vindicate a claim of its own in our courts. Chile's liability to judgment creditors need not be fictionally imputed to the airline entity; rather that airline entity's "liability" results from the fact that it is wholly owned by the judgment debtor which, as owner of the airline, could lawfully require the airline to disgorge its assets for Chile's own purposes. Judgment creditors now stand in Chile's shoes. Finally, the legitimate expectations of the airline's own creditors are not threatened. They allowed the enterprise to indebt itself to them with full knowledge that it was owned by Chile, that Chile had debts of its own and that Chile might interrupt the airline's business or otherwise affect the airline's capacity to pay. In case of insolvency, Chile's equity in its subsidiary's assets is normally subordinated to the claims of the subsidiary's creditors

and a proceeding in receivership, like that below, was ideally adapted to determination of the relative priorities.

Absent sovereign immunity, the Chilean state's legal and equitable property rights are as leviable as those of a private person. FSIA § 1606. Certainly comity toward Chile (*see Hilton v. Guyot, supra,* 154 U.S. at 163) requires no greater privilege than is accorded our own commercial enterprises. As this Court stated in *Bancec,* the FSIA

> was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state. Section 1606 of the FSIA provides in relevant part that '[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity. . . , the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances. . .' *Bancec,* 462 U.S. at 620 (quoting H.R. Rep. 12)

As a result of the use to which the assets were put, the Chilean state (a term which includes the state's instrumentalities – *see* § 1603(a)) has lost immunity from execution. If treated as a private party, it is clear that the airline is subject to the consequences of being owned by the judgment debtor. The Seventh Circuit recognized the nature of those consequences in *In Re Uranium Antitrust Litigation,* 617 F. 2d 1248 (7th Cir. 1980), where it noted that wholly owned subsidiaries of defaulting foreign defendants "were found to be 'assets' of the defaulters and thus subject to execution on the judgment" of liability which had been entered against their parent corporations. 617 F.2d at 1256, n. 32.

The FSIA provides that the same rules would apply as in

the private context (§ 1606), and does not otherwise indicate the extent to which nonimmune assets of a subsidiary agency or instrumentality would be subject to levy for satisfaction of judgment against an owner state. FSIA legislative history specifically stated that this issue would be left for decision to the courts.

> [T]he courts will have to decide whether property 'in the custody' of an agency or instrumentality is property 'of' the agency or instrumentality, whether property held by one agency should be deemed to be property of another, *whether property held by an agency is property of the foreign state.* H. Rep. at 28. (Emphasis added.) [9]

Applying the general law as to the rights of creditors of a sole shareholder, precious little "piercing" is required to enforce a judgment upon nonimmune assets held in the name of the judgment debtor's wholly owned corporation. Receivership brings airline assets within judgment creditors' reach, without resort to enslaving metaphor. *See Bancec,* 462 U.S. at 623. Nonetheless, the District Court correctly held that, as a result of the same abusive acts whereby Chile had recruited its airline's involvement in the wrongful scheme, Chile had both lost sovereign immunity and lost the right of separate jural identity for its airline.

In present circumstances it is not necessary to hold that a government instrumentality is but a shell in order to determine that its owner's interest in its assets may be subject to levy; but there was extensive evidence in the record that the airline is no more than a department of the

---

[9]While the legislative history indicates that property of one agency should not be subject to execution to satisfy a judgment against a sister agency, (H. Rep. at 29-30), this is nothing more than a restatement of general law which is also applicable in the private context.

government, tightly controlled by the Chilean executive, which appoints its management to serve at the government's pleasure, regularly makes up its losses, establishes its policy, and has power to use it for such purposes as it may choose. JA 307-315, 558-60, 784-95. This showing, coupled with Chile's blatant default upon discovery, justifies the conclusion that the airline is so devoid of genuine existence as to be liable for the debts of Chile in general. The Court of Appeals overlooked the point that if the airline is but the alter ego of Chile then the judgment is extended to the airline and all assets of a lesser instrumentality, such as an airline, are subject to execution upon a § 1605(a)(5) judgment pursuant to § 1610(b)(2), "regardless of whether connected to the claim." Since Chile has placed those assets in the name of an entity of lesser dignity than the state itself, they have the lesser degree of immunity provided by § 1610(b)(2), even though the separate personality of the airline may have been so severely abused that it can no longer be recognized for other purposes.[10]

---

[10]While some cases hold that one who obtains a default judgment against a shell corporation cannot thereafter extend the liability of that judgment to bind the corporation's owner *(See Motores de Mexicali S.A. v. Superior Court of Los Angeles,* 51 Cal. 2d 172, 331 P.2d 1 (1958); *Minton v. Cavaney,* 56 Cal. 2d 576, 364 P.2d 473 (1961)), they are not relevant to the situation where one has obtained a judgment against the paramount owner itself. The rationales of those cases is that if one has sought judgment against a shell, its owner has not had fair notice that the judgment may bind him personally and may have decided to let his subsidiary default on that basis. It is self-evident, however, that suit against Chile gave notice that execution upon any of its property might be contemplated, and if the airline is but an *alter ego* then airline property is subject to execution as that of Chile. The airline's "own" guilt or innocence is irrelevant since, as a mere alter ego, it may lack sufficient jural personality to bear civil or criminal responsibility.

### B. There is no Justification for Shielding a Wholly Owned Instrumentality from the Consequences of its Owner's Decision to Default Upon Discovery.

The privilege of doing business in corporate form is one conferred on the shareholders and which may be forfeited by the shareholders. Chile defaulted upon discovery related to the question whether it had respected the separate jural identity of its airline. It was a logical sanction for the District Court to infer as a fact that it had not respected that jural identity. While entry of such a sanction against Chile led to transfer of Chile's rights to its creditors, the airline had no just complaint since the creditors exercise only such rights as Chile itself had. By defaulting, in disregard of the due process of our law, Chile chose to relinquish those rights to judgment creditors.

It would be absurd to have to prove, as postulated by the Court of Appeals (App. 11a n. 2), that a subsidiary "controls" its owner before the owner's misconduct may result in sanctions which cause transfer of an owner's interest in the subsidiary's assets. It is one thing to concede a fictive existence to a corporate instrumentality; it is quite another to profess an inability to distinguish between the ventriloquist and his dummy. In demanding proof that the dummy controls its ventriloquist, the Court of Appeals exceeded the bounds of useful fiction and entered the domain of the absurd. It also contradicted its own prior holding in *Trans World Airlines, Inc. v. Hughes Tool Co.*, 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973) that a wholly owned subsidiary must face sanctions as a result of its sole owner's default upon discovery demands.[11] That approach has been taken

[11]As the Second Circuit declared in affirming the sanction of default in that case, "[T]here is, of course, no question that [the sub-

uniformly by other Circuits. *E.g., Barta v. Long,* 670 F.2d 907 (10th Cir. 1982); *Anderson v. Air West, Inc.,* 542 F.2d 1090 (9th Cir. 1976). Chile is a recalcitrant debtor which defaulted in the District of Columbia and defaulted again in enforcement proceedings. It best knows the extent to which its intelligence services disregarded its airline's normal chains of command and abused that entity's jural personality. Its default upon discovery denied judgment creditors that essential information. The legislative history of FSIA § 1606 makes clear that if foreign sovereigns are subject to suit they are subject to discovery in substantially the same manner as a private litigant. H. Rep. at 23. Whatever privileges or arguments Chile might have advanced with respect to particular discovery demands, Chile chose to default, and FSIA legislative history states flatly that "appropriate remedies would be available under Rule 37, F.R.Civ.P., for an unjustifiable failure to make discovery." *Id.* This is not a case where petitioners bootstrapped themselves into findings by serving unreasonable discovery demands in support of an improbable claim. Judge Lasker called for discovery against Chile only after he found petitioners had made a "considerable" showing of abuse of the ariline entity based on admissible evidence. Default upon discovery, even as to issues of personal jurisdiction, may result in decisive sanctions (*Insurance Corp. of Ireland Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694 (1982)), and such sanctions were entirely appropriate in this case in light of petitioners' independent showing and Chile's obdurate disregard of its obligations toward the United States.

---

sidiary] was responsible for the actions of the owner of all its stock." 449 F.2d at 59.

## CONCLUSION

This is a case which tests the ability of our courts to enforce basic tenets of order and law against the terrorist impulses of a foreign government — unbridled impulses which led to a public outrage on the very streets of our capital. In seeking a compensatory remedy for their injuries, petitioners have attested to their faith in our legal system and their belief that acts of state-inspired terrorism, however savage, can ultimately be repressed and overcome by the persistent working of the law, just as the processes of law have overcome other forms of violence which infested our country in earlier periods. Petitioners believe that the Court of Appeals was unduly daunted by the "political" motivations which doubtless lay behind the scheme. Assassination should not be so dignified. When committed in our territory by stealth, with the aid of a state's commercial activity, it is a mean act which our courts should not shrink from judging in an ordinary way. Certainly we cannot call on the Executive to make war in consequence, nor should we adopt the futile approach of the Court of Appeals, which, insisting on its own helplessness, speculated that "there may be a forum in South America or elsewhere" that will provide a remedy. App. 20a, n. 4. To the contrary, when a scheme involves air transport of explosives and bomb components through JFK airport, and causes the death of an American woman on the streets of Washington, D.C., the remedy will be in United States courts or nowhere.

This is a case in which it is important that justice be done and be seen to be done. International terrorism is far more dangerous if facilities of state commercial enterprises can be readily turned to its use, without sanction or consequence for states which so abuse their right to do business on our territory.

In the FSIA Congress expressed its intention to grant a compensatory remedy, making a foreign sovereign's assets in the United States subject to execution if the assets were used in a commercial activity which gave rise to the claim. It is axiomatic that when foreign sovereigns use their United States commercial activities in a damage causing endeavor they should expect to pay the judgment from the proceeds of such assets. In reaching a contrary conclusion, the Court of Appeals mired itself in erroneous technical arguments that would frustrate the remedial intent of Congress and permit the flouting of our legal order. For all these reasons we respectfully pray that the writ of certiorari be granted.

Respectfully submitted,

William J.T. Brown
Donovan Leisure Newton &
Irvine
30 Rockefeller Place
New York, New York 10112
(212) 307-4100

Michael E. Tigar
727 East 26th Street
Austin, Texas 78705

John J. Privitera
Samuel J. Buffone
Buffone & Privitera, P.C.
1302 18th Street, N.W.
Suite 603
Washington, D.C. 20036

April 4, 1985

**APPENDIX A**

**Isabel Morel De LETELIER, et al.,**
**Judgment Creditors-Appellees,**

**v.**

**The REPUBLIC OF CHILE, also doing business as Linea Aerea Nacional-Chile,**
**Judgment Debtor,**

**and**

**Linea Aerea Nacional-Chile,**
**Garnishee-Appellant.**

**No. 1251, Docket 83-9048.**

United States Court of Appeals,
Second Circuit.

Argued May 14, 1984.

Decided Nov. 20, 1984.

---

Gerald D. Morgan, Jr., New York City (Thomas E. Engel, Carter K. Combe and Robert P. Knapp, III, Hale, Russell & Gray, New York City, of counsel, for garnishee-appellant.

William J.T. Brown, New York City (Joseph P. Cyr, Mary Landergan Kibbe, Donovan Leisure Newton & Irvine, New York City, Michael E. Tigar, Samuel J. Buffone, John J. Privitera, Tigar & Buffone, Washington, D.C., of counsel), for judgment creditors-appellees.

Before CARDAMONE and PRATT, Circuit Judges and BONSAL, District Judge.*

---

*Honorable Dudley B. Bonsal, United States District Court Judge for the Southern District of New York, sitting by designation.

CARDAMONE, Circuit Judge:

The critical question posed on this appeal is whether the assets of a foreign state's wholly owned airline are subject to execution to satisfy a default judgment obtained against the foreign state. The district court, believing that Congress under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11 (1982) (FSIA or the Act), would not have established a right to jurisdiction over the foreign state without also providing a remedy, ordered execution. We reverse although we recognize that our decision may preclude the plaintiffs from collecting on their judgment. How one wishes to decide a case comes lightly to mind, on a wing; but often how one must decide it comes arduously, weighed down by somber thought. To rule otherwise here would only illustrate once again that hard cases make bad law.

## FACTS

Orlando Letelier, the former Chilean Ambasador to the United States, his aide, Michael Moffitt, and Moffitt's wife, Ronni, were riding to work in Washington, D.C. in September, 1976 when an explosive device planted under the driver's seat in their car was detonated killing both Letelier and Ronni Moffitt and seriously injuring Michael Moffitt. That assassination gives rise to the present appeal.

Investigation by agencies of the United States government into these murders revealed the identity of nine assassins and their alleged connection to the government of Chile. Of the nine only Michael Vernon Townley, an American citizen working for Chilean intelligence, was convicted of a criminal offense. Three of those indicted were members of the Cuban Nationalist Movement who,

although found guilty in the trial court, had their convictions reversed on appeal. *See United States v. Sampol,* 636 F.2d 621, 684 (D.C.Cir.1980). Of the other five individuals indicted, none was brought to trial: three were Chilean nationals that Chile refused to extradite, and two remain at large.

In August 1978 the personal representatives of Letelier and Moffitt instituted a civil tort action in the United States District Court for the District of Columbia against the indicted individuals and the Republic of Chile. The complaint asserted five causes of action: (1) a conspiracy to deprive Letelier and Moffitt of their civil rights under 42 U.S.C. § 1985; (2) assault and battery; (3) reckless transportation and detonation of explosives; (4) violation of the "law of nations" (international law); and (5) murder of an internationally protected person under 18 U.S.C. § 1116. The complaint alleged that the noncommercial tort exception of § 1605(a)(5) of the FSIA applied and that Chile was not entitled to sovereign immunity in the tort action.

All defendants defaulted, although Chile sent two Diplomatic Notes to the United States Department of State asserting its sovereign immunity and that the allegations against it were false. The State Department forwarded these Notes to the clerk of the district court. In August 1978 the trial court granted default judgments against the individual defendants. During 1979 and 1980 the district court heard plaintiffs' motion for a default judgment against Chile, *see Letelier v. Republic of Chile,* 488 F.Supp. 665 (D.D.C.1980), and finally resolved that motion. *See Letelier v. Republic of Chile,* 502 F.Supp. 259 (D.D.C. 1980). In the former case, the court ruled that it had subject matter jurisdiction pursuant to the exception

to immunity found in § 1605(a)(5) of the Act. In the latter case the trial court relying on Townley's testimony at the criminal trial, where he had pled guilty and testified for the prosecution, granted a default judgment against the Republic of Chile and awarded plaintiffs over five million dollars including interest, compensatory and punitive damages, counsel fees and out of pocket expenses. The Republic of Chile did not take an appeal from either of these judgments.

The resulting judgment against the Republic of Chile was entered in the United States District Court for the District of Columbia. Plaintiffs subsequently filed the judgment in the United States District Court for the Southern District of New York, *see* 28 U.S.C. § 1963 (1982), for the purpose of executing on the property interests that The Republic of Chile has in the Chilean national airline, Linea Aerea Nacional-Chile or LAN, which is located in New York, and for the appointment of Michael Moffitt as a receiver of those interests to satisfy the judgment against Chile pursuant to New York's CPLR 5228 and Fed.R.Civ.P. 69. The application for execution against LAN's assets came before District Court Judge Morris E. Lasker. LAN moved to dismiss claiming that it should not be held to answer for Chilean debts and that its assets were immune from execution. Relying upon a recent decision of the United States Supreme Court, *First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec),* 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983), which based a decision to disregard separate corporation identities on "international equitable principles," Judge Lasker first held in an opinion and order dated July 28, 1983 that, were the facts as asserted, LAN's role in the assassination was commercial activity under the Act. He further held that to adhere to LAN's separate cor-

porate identity would, as in *Bancec,* violate equitable principles. *Letelier v. Republic of Chile,* 567 F.Supp. 1490, 1496 (S.D.N.Y. 1983).

Having concluded that LAN's assets were subject to execution to satisfy a judgment against Chile, the district court concluded that the language of § 1610(a)(2) did not limit execution only to commercial assets used for commercial purposes, as LAN claimed, but also permitted execution to satisfy tort judgments "so long as the assets on which the judgment creditor seeks to execute were also used commercially in the activity giving rise to the claim." *Id.* at 1499. The rationale for this reading of the statute was that a statute should not be interpreted to create a right without a remedy. The court reasoned that if jurisdictional immunity is lifted, the presumption is that there will be a right to execute. *Id.* at 1500 & n. 7.

Plaintiffs later sought discovery against The Republic of Chile by serving it with interrogatories and requests to produce documents and admit facts. Chile refused to comply and again filed Diplomatic Notes asserting its refusal to recognize either the validity of the default judgment or the district court's jurisdiction in the supplementary proceedings for enforcement. Judge Lasker in an order dated December 20, 1983 granted plaintiff's motions for Rule 37 sanctions against LAN consisting of adverse findings of fact that provided a basis to disregard LAN's juridical separateness, and appointed Moffitt as a receiver of LAN's assets in the United States. 575 F.Supp. 1217 (S.D.N.Y.1983). From the rulings of July 28 and December 20, 1983 LAN has appealed and raised a number of issues.

## DISCUSSION

The principal issue is whether LAN's assets may be executed upon to satisfy the judgment obtained in the District of Columbia against Chile. This discussion necessarily focuses on the Foreign Sovereign Immunities Act of 1976, which is the exclusive source of subject matter jurisdiction over all suits involving foreign states or their instrumentalities. *Rex v. CIA Pervana de Vapores, S.A.*, 660 F.2d 61, 62 (3d Cir.1981), *cert. denied,* 456 U.S. 926, 102 S.Ct. 1971, 72 L.Ed.2d 441 (1982). According to § 1604, foreign states are immune from suit in our courts unless the conduct complained of comes within the exceptions set forth in §§ 1605 to 1607 of the Act. Similarly, under § 1609 foreign states are immune from execution upon judgments obtained against them, unless an exception set forth in §§ 1610 or 1611 of the FSIA applies.

The judgment creditors claim that § 1610(a)(2) allows them to execute upon LAN's assets in this case. Section 1610(a)(2) provides:

> The property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution . . . if . . . the property is or was used for the commercial activity upon which the claim is based . . . .

We consider first whether LAN's separate juridical existence may be ignored, thereby making its assets "[t]he property in the United States of a foreign state."

### I *Separate Juridical Existence*

In *Bancec* the Supreme Court determined whether a claim of a foreign agency plaintiff was subject to a set-off

for the debts of its parent government. *Bancec* deserves close scrutiny because it provides a conceptual framework for resolving plaintiff's assertion that LAN's assets should be treated as assets of Chile and because the district court relied on it to reach that conclusion.

In *Bancec,* the Cuban bank of the same name brought suit against Citibank to collect on a letter of credit issued in its favor in 1960. Citibank counterclaimed arguing that it was entitled to set-off amounts as compensation due it for the Cuban government's expropriation of Citbank's assets in Cuba. We ruled that as Bancec was not the alter ego of the Cuban government, it could not be held to account for Cuban debts. The Supreme Court reversed. Relying on the Act's legislative history, the Court noted that it was not intended to affect the substantive law of liability of a foreign state or the attribution of liability among its entities and proceeded to resolve the appeal on "equitable principles." The *Bancec* Court recognized that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." 103 S.Ct. at 2600. FSIA's legislative history provided support for that conclusion:

> Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary. However, a court might find that property held by one agency is really the property of another. H.R.Rep. No. 94-1487,

pp. 29-30, U.S.Code Cong. & Admin.News 1976, 6604, pp. 6628, 6629 (citation omitted.)

The Supreme Court concluded in *Bancec* that the presumption of separateness had been overcome. It reasoned that the real beneficiary of any recovery would be the Cuban government, and that Cuba should not be permitted to obtain relief in American courts without answering for its seizure of Citibank's assets. The Court commented that "Cuba cannot escape liability for acts in violation of international law simply by retransferring the assets to separate juridical entities." 103 S.Ct. at 2603.

Thus, *Bancec* rests primarily on two propositions. First, Courts may use set-off as a unique, equitable remedy to prevent a foreign government from eluding liability for its own acts when it affirmatively seeks recovery in an American judicial proceeding. *See National City Bank v. Republic of China,* 348 U.S. 356, 75 S.Ct. 423, 99 L.Ed. 389 (1955). The broader message is that foreign states cannot avoid their obligations by engaging in abuses of corporate form. The *Bancec* Court held that a foreign state instrumentality is answerable just as its sovereign parent would be if the foreign state has abused the corporate form, or where recognizing the instrumentality's separate status works a fraud or an injustice.

The district court analyzed the present case in light of *Bancec* and ruled that Chile's alleged use of LAN to transport Townley and explosives to the United States were "significant steps in the conspiracy" that if proven "would constitute a gross abuse of the corporate form." 567 F.Supp. at 1496. Accordingly, it held, "If Chile ignored LAN's separate existence in accomplishing the wrong, it may not invoke that separate existence in order to deny the injured a remedy." *Id.* at 1496.

The district judge "found" the following facts based "on the record" and "established" by evidentiary sanctions imposed pursuant to Rule 37(b)(2)(A): From January 1975 through January 1979 LAN's assets and facilities were under the direct control of Chile, which had the power to use them; Chile could have decreed LAN's dissolution and taken over property interests held in LAN's name; Chile, through its agencies, officers, and employees, intentionally used facilities and personnel of LAN to plan and carry out its conspiracy to assassinate Orlando Letelier by (a) transporting Michael Vernon Townley between Chile and the United States, (b) transporting explosives on several occasions, (c) assisting with currency transactions involved in paying off the co-conspirators in the assassination, (d) providing a meeting place for the co-conspirators, (e) arranging for Townley to exit the United States under an alias after the assassination. By using LAN in these endeavors, the district court found, Chile ignored LAN's separate existence and abused the corporate form.

In our view this is not the sort of "abuse" that overcomes the presumption of separateness established by *Bancec*. Joint participation in a tort is not the "classic" abuse of corporate form to which the Supreme Court referred. In *Bancec* the Court relied by analogy on the domestic law of private corporations that ignores separate juridical status "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created," where "the corporate form . . . is interposed to defeat legislative policies," or where recognition of corporate form " 'would work fraud or injustice.' " 103 S.Ct. at 2601. The facts that the district court "found" here do not add up to anything that resembles the abuses in the decisions cited in *Bancec*. None of these facts shows that Chile ignored LAN's separate status. Instead, they

simply demonstrate that Michael Townley was able to enlist the cooperation of certain LAN pilots and officials with whom he had a pre-existing social relationship in pursuing his sinister goal. There was no finding that LAN's separate status was established to shield its owners from liability for their torts or that Chile ignored ordinary corporate formalities. *See Establissement Tomis v. Shearson Hayden Stone,* 459 F.Supp. 1355, 1365 (S.D.N.Y.1978); *Brunswick Corp. v. Waxman,* 459 F.Supp. 1222, 1229 (E.D.N.Y.1978).[1]

Plaintiffs had the burden of proving that LAN was not entitled to separate recognition. A creditor seeking execution against an apparently separate entity must prove "the property to be attached is subject to execution." *Palmiter v. Action, Inc.,* 548 F.Supp. 1166, 1172 (N.D.Ind.1982). *See In re Beck Indus.,* 479 F.2d 410, 417 (2d Cir.1973); *Mission Bay Campland v. Sumner Financial Corp.,* 71 F.R.D. 432, 435 (M.D.Fla.1976). The evidence submitted by the judgment creditors does not reveal abuse of corporate form of the nature or degree that *Bancec* found sufficient to overcome the presumption of separate existence. As both *Bancec* and the FSIA legislative history caution against too easily overcoming the presumption of sepa-

[1]Further, an "injustice" might be inflicted on third parties were LAN's separate status so easily ignored. Here, plaintiffs are attempting to obtain an affirmative recovery against a foreign agency; no equitable set-off is involved. Under these circumstances abuse of corporate form must be clearly demonstrated to justify holding the "subsidiary" liable for the debts of its sovereign "parent," particularly, where, as here, LAN apparently has non-party private bank creditors. Concern for these non-party creditors is stronger in this case as the net result will be an out-of-pocket loss to LAN. To adopt a rule facilitating an easy piercing of the corporate veil threatens the interests of such unsuspecting third parties.

rateness, we decline to extend the *Bancec* holding to do so in this case.[2]

## II *Commercial Activity*

Even assuming the district court was correct in disregarding LAN's corporate form and finding that LAN's assets were Chile's property in the United States, § 1610(a)(2) also requires that the property be "used for the commercial activity upon which the claim is based." In permitting execution against LAN's assets the court below essentially concluded that LAN's activities aided Townley in the assassination and constituted the "commercial activities" that § 1610(a)(2) requires. We cannot agree because a consistent application of the Act, analysis of the background of its enactment, its language and legislative history, and the case law construing it compel the opposite conclusion.

We first note that the district court for the District of Columbia found that Chile lost its immunity from jurisdiction pursuant to § 1605(a)(5), the "tortious activity" exception to jurisdictional immunity. Section 1605(a)(5) specifically states that it applies to situations "not other-

---

[2]Our conclusions regarding LAN's separate juridical status are strengthened by our finding that in its December 20 order the district court incorrectly determined evidentiary issues adversely to LAN based solely on Chile's failure to comply with discovery requests. Rule 37 sanctions ensure that a party will not benefit from non-compliance with discovery orders. Yet, one party to litigation will not be subjected to those sanctions because of the failure of another to comply with discovery, absent a showing that the other party controlled the actions of the non-complying party. 4A J. Moore, Moore's Federal Practice ¶ 37.05 at 37-106, 107 (2d ed. 1984). *See, e.g., Bon Air Hotel v. Time, Inc.*, 376 F.2d 118 (5th Cir.1967); *Illinois Central R.R. Co. v. Templar*, 463 F.2d 972 (10th Cir.1972). Here there was no finding by the district court based on independent evidence that the actions of LAN and Chile are one and the same.

wise encompassed in paragraph (2)." Section 1605(a)(2) is the commercial activity exception. This language suggests that the commercial activity exception to jurisdictional immunity under (2) and the tort exception under (5) are mutually exclusive. If the district court in the District of Columbia lifted jurisdictional immunity based on its finding that the activities complained of were tortious, not commercial, it is inconsistent for this court to lift execution immunity based on a finding that the activities were commercial.

Our disagreement with the finding that LAN's activities were commercial rests on more than the resulting lack of symmetry in application of the FSIA. If LAN, as the trial court found, acted in complicity with the Chilean secret police in the assassination, its activities had nothing to do with its place in commerce. The nature of its course of conduct could not have been as a merchant in the marketplace. Its activities would have been those of the foreign state: governmental, not private or commercial.

Chief Justice Marshall with his decision in *The Schooner Exchange v. McFaddon,* 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812) upheld France's plea of sovereign immunity. In that case American citizens claimed ownership of a French vessel of war berthed in Philadelphia. The executive department recommended to the Supreme Court that it dismiss the claim and the Supreme Court complied with that suggestion. After *The Schooner Exchange* it became the rule that American courts would exercise jurisdiction over foreign states unless the matter was intimately connected with foreign policy and the executive department charged with the conduct of foreign policy asked for judicial abstention. In 1976 Congess, acting pursuant to its Article I powers, changed that practice by enacting

the Foreign Sovereign Immunities Act. The Act assigns the task of deciding whether a foreign sovereign is immune solely to federal and state courts sitting without juries.

The FSIA adopts a restrictive view of sovereign immunity. The absolutist view, which found foreign sovereigns immune from suit for any activity, fell into disfavor in other countries and a more restrictive rule succeeded it. In 1952 the United States Department of State signalled with its Tate Letter, 26 Dep't of State Bull. 984, that it embraced the new rule. *See National City Bank of New York v. Republic of China,* 348 U.S. 356, 75 S.Ct. 423, 99 L.Ed. 389 (1955). This restrictive view grants immunity for "governmental" acts of a foreign state and denies it for acts of a "private" nature. This translates into the "commercial activity" exceptions in the FSIA.

FSIA § 1602 contains the findings and declaration of purpose for the Act. That section states:

> Under international law, states are not immune from the jurisdiction of foreign courts insofar as their *commercial activities* are concerned, and their commercial property *may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.* (emphasis furnished).

Under§ 1603(d) commercial activity is defined as "either a regular course of commercial conduct or a particular commercial transaction or act." S.Rep. No. 94-1310, 94th Cong., 2d Sess. (1976) (Senate Report) recognizes that activities fall along a "spectrum" bounded by "commercial" behavior on one end of the spectrum and "governmental" activity on the other:

> Certainly, if an activity is customarily carried on for profit, its commercial nature could readily

> be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a "particular transaction or act."

*Id.* at 15. The Senate Report contains examples of commercial activities:

> Activities such as a foreign government's sale of a service or product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents or its investment in a security of an American corporation would be among those included within the definition.

*Id.* at 16. Congress specifically designed the execution immunity rules to "conform" to the jurisdictional immunity provisions of § 1605. H.R.Rep. No. 94-1487, 94th Cong.2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Ad.News 6604, 6626 (*House Report*).

Congress intended the "essential nature" of given behavior to determine its status for purposes of the commercial activities exception, and gave the courts a "great deal of latitude" to decide this issue. *Id.* at 6615. The legislative history makes clear that courts should not deem activity "commercial" as a whole simply because certain aspects of its are commercial. The example given is that the AID programs remain governmental even though they involve behavior traditionally performed by private persons.

The district court correctly noted that under § 1603(d) the court must inquire into the nature of the conduct, not its purpose, to determine if it is "commercial." *See Texas Trading & Milling Corp. v. Federal Republic of Nigeria,* 647 F.2d 300, 310 (2d Cir.1981), *cert. denied,* 454 U.S.

1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982) (Nigerian government's purchase of cement was a commercial activity irrespective of its purposs for so doing). The commercial activity exception of § 1605(a)(2) has been interpreted broadly, *In re Rio Grande Transport,* 516 F.Supp. 1155, 1162 (S.D.N.Y. 1981). "The determination of whether particular behavior is 'commercial' is perhaps the most important decision a court faces in an FSIA suit." *Texas Trading,* 647 F.2d at 308. As with any statutory term, the "commercial activity" requirement must be given a logical and reasonable interpretation. Inquiry therefore ordinarily focuses on whether the specific acts are those that private persons normally perform. *See Texas Trading & Milling Corp., supra,* 647 F.2d at 309; *Rios v. Marshall,* 530 F.Supp. 351, 371-72 (S.D.N.Y.1981); *cf. Gibbons v. Udaras na Gaeltachta,* 549 F.Supp. 1094, 1110-11 (S.D. N.Y.1982) (joint venture agreement with private corporation is "commercial activity"). Yet, not every act of a foreign state that could be done by a private citizen in the United States is "commercial activity," *see In re Sedo, Inc.,* 543 F. Supp. 561, 565 (S.D.Tex.1982) (holding that the Mexican national oil company's drilling of the infamous IXTOC I well in the Gulf of Mexico was not "commercial activity"). The court must inquire whether the activity is of the type an individual would customarily carry on for profit. *Gibbons,* 549 F.Supp. at 1110. One of the few decisions that has construed § 1610(a)(2) also searched for evidence of a profit motive on the foreign sovereign's part. *United States v. County of Arlington, Va.,* 702 F.2d 485, 488 (4th Cir.1983). *See also, Frolova v. U.S.S.R.,* 558 F.Supp. 358 (N.D.Ill.1983) (refusal to allow immigration is public, not commercial, activity).

A case that involved facts analogous to those before us is *Arango v. Guzman Travel Advisors Corp.,* 621 F.2d

1371 (5th Cir.1980), which was decided under § 1605, not § 1610. In *Arango,* the plaintiffs sued the wholly owned, national airline of the Dominican Republic after being expelled from a flight because that country's officials would not permit them entry. Although the Court dismissed the appeal because it was taken from a non-appealable order, it discussed (in dicta) whether the "commercial activity" exception of § 1605(a)(2) would allow plaintiffs to bring their tort action against the airline. The *Arango* court considered the airline's actions in rerouting plaintiffs noncommercial because it concluded that the airline acted merely as the agent of the Dominican government. *Id.* at 1379.

We agree with the *Arango* analysis. The *Arango* court found that alleged "kidnapping" by a foreign state is not "commercial activity" under the FSIA because a private person cannot lawfully engage in that activity. 567 F.Supp. at 1501. A private person cannot lawfully engage in murder any more than he can in kidnapping or criminal assault. Carriage of passengers and packages is an activity in which a private person could engage. But it is not for those activities that LAN's assets are being executed against. Rather, plaintiffs assert that LAN itself participated in the assassinatioin and essentially accuse LAN of being a co-conspirator or joint tortfeasor.[3] In other words, LAN is accused of engaging in state-sponsored terrorism the purpose of which, irrelevant under the FSIA, was to assassinate an opponent of the Chilean government. Politically motivated assassinations are not traditionally the function of private individuals. They can scarcely be considered commercial activity. Viewed in this light, LAN's participation, if any, in the assassination is

---

[3]In fact, the court below relied on LAN's "status" as such to make its finding of apparent abuse of corporate form.

not commercial activity that falls within the § 1610(a)(2) exception and its assets therefore are not stripped of immunity.

## III *Right Without a Remedy*

The district court's principal concern with finding LAN immune from execution on its assets was that "[h]aving determined to grant jurisdiction in both commercial and tort claims, it appears out of joint to conclude that Congress intended the surprising result of allowing only commercial creditors to execute on their judgments," 567 F.Supp. at 1499-1500. Hence, it concluded that Congress would not create a right without a remedy. Few would take issue with the district judge's comment as an abstract principle of statutory interpretation. Nevertheless, when drafting the FSIA Congress took into account the international community's view of sovereign immunity. That makes a world of difference in the Act's interpretation. The Act's history and the contemporaneous passage of similar European legislation strongly support the conclusion that under the circumstances at issue in this case Congress did in fact create a right without a remedy. Congress wanted the execution provisions of the FSIA to "remedy, *in part,* the [pre-FSIA] predicament of a plaintiff who has obtained a judgment against a foreign state." *House Report, supra,* at 6605-06 (emphasis added). It is to that pre-FSIA plaintiff's predicament that we now turn.

To put the execution immunity provisions of the 1976 Act in proper perspective it is helpful to examine them in light of the European Convention on State Immunity and Additional Protocol adopted in 1972 and the United Kingdom's enactment of The State Immunity Act of 1978. Although these two codifications contain vastly different ap-

proaches to execution of judgments, they are relevant to this discussion in that neither Act ensures that a party may execute on a judgment against a foreign state by attaching property, even if it may validly assert jurisdiction over that foreign state. *See* Note, *The International Law Association Draft Convention on Foreign Sovereign Immunity: A Comparative Approach,* 23 Va.J.Int'l. L. 635, 658 (1983).

The European Convention, because of its members' conflicting views, decided not to provide machinery for the enforcement of judgments by execution. The Convention relied instead on the obligation of an individual State to honor judgments taken against it. A judgment creditor must ordinarily obtain satisfaction through executive or administrative channels, though when both States involved have made certain declarations the European Court of Human Rights provides a judicial remedy. *ILA Draft Convention* at 662-63. In effect, the European Convention leaves execution by judgment creditors at the mercy of the defendant State's policies. This is scarcely surprising as Article 2, paragraph 7 of the Charter of the United Nations declared the same rule 37 years earlier. Paragraph 7 prohibits the United Nations from intervening "in matters which are essentially within the domestic jurisdiction of any state." S. Goodrich & E. Hambro, *Charter of the United Nations, Commentary and Documents* 65 (1946).

The State Immunity Act like the FSIA grants general immunity from execution over a foreign state's property except that, unlike the FSIA, which permits execution only on property upon which the claim is based, courts in England may execute on property in use or intended to be used for commercial purposes. *ILA Draft Convention* at 661. Hence, The State Immunity Act restricts immunity from execution more than the FSIA and subjects *any* pro-

perty of the foreign state used for commercial purposes to execution.

The FSIA distinguishes between execution against property of an agency or instrumentality of a foreign state, which may be executed against regardless of whether the property was used for the activity on which the claim is based under § 1610(b)(2), and the property of the foreign state itself, which may be executed against only when the property was used for the commercial activity on which the claim is based under § 1610(a)(2). In so distinguishing, Congress sharply restricted immunity from execution against agencies and instrumentalities, but was more cautious when lifting immunity from execution against property owned by the State itself. Congress passed the FSIA on the background of the views of sovereignty expressed in the 1945 charter of the United Nations and the 1972 enactment of the European Convention, which left the availability of execution totally up to the debtor state, and its own understanding as the legislative history demonstrates, that prior to 1976 property of foreign states was absolutely immune from execution. *House Report* at 6606. It is plain then that Congress planned to and did lift execution immunity "in part." Yet, since it was not Congress' purpose to lift execution immunity wholly and completely, a right without a remedy does exist in the circumstances here. Our task must be to read the Act as it is expressed, and apply it according to its expressions. *See Berger v. United States,* 255 U.S. 22, 35, 41 S.Ct. 230, 233, 65 L.Ed. 481 (1921).

## CONCLUSION

We hold therefore that the Foreign Sovereign Immunities Act does not allow execution against the assets of LAN,

the Chilean National Airlines.[4] The court below improperly ignored defendant LAN's separate juridical status from the Republic of Chile. Ordinarily, we would remand for further evidentiary hearings on the separateness issue, but we are further persuaded, even were LAN and Chile found to be alter egos, that Congress did not provide for execution against a foreign state's property under the circumstances of this case. Congress provided for execution against property used in commercial activity upon which the claim is based. An act of political terrorism is not the kind of commercial activity that Congress contemplated.

Accordingly, we reverse the orders appealed from and dismiss the supplementary proceedings.

---

[4]Although tenuous, other remedies may still be possible. Chile itself may decide as an act of international good-will to honor the judgment of the United States District Court for the District of Columbia. Alternatively, the United States may be persuaded to bring this claim before some international tribunal as it did in *Z & F Assets Realization Corp. v. Hull,* 311 U.S. 470, 487, 61 S.Ct. 351, 354, 85 L.Ed. 288 (941).

## APPENDIX B

**Isabel Morel De LETELIER, Michael Maggio, as personal representative of Orlando Letelier, Christian A. Letelier, Jose I. Letelier, Francisco J. Letelier, Juan Pablo Letelier, Michael Moffitt, individually, and as personal representative of Ronni Karpen Moffitt, Murray H. Karpen, and Hilda Karpen, Judgment Creditors,**

**v.**

**The REPUBLIC OF CHILE, also doing business as Linea Aerea Nacional-Chile, Judgment Debtor,**

**and**

**Linea Aerea Nacional-Chile, Garnishee-Respondent.**

**No. M18-302.**

United States District Court,
S.D. New York.

July 28, 1983.

---

Tigar & Buffone, Washington, D.C., Donovan, Leisure, Newton & Irvine, New York City, for judgment creditors; William J.T. Brown, Joseph P. Cyr, New York City, Michael E. Tigar, John J. Privitera, Washington, D.C., of counsel.

Hale, Russell & Gray, New York City, for judgment debtor; Thomas F. Engel, New York City, Gerald D. Morgan, Jr., Washington, D.C., Carter K. Combe, Karen Gross, New York City, of counsel.

LASKER, District Judge.

The personal representatives and survivors of Orlando Letelier and Ronni Moffitt ("judgment creditors") move

pursuant to Fed.R.Civ.Pr. 69 and N.Y.C.P.L.R. § 5228 for the appointment of Michael Moffitt as receiver of the property interests of the Republic of Chile in the Chilean national airline, Linea Aerea Nacional-Chile ("LAN"). The judgment against Chile was entered in the United States District Court for the District of Columbia, and has been filed in this court pursuant to the requirements of 28 U.S.C. § 1963.

The action arose from the tragic deaths of Orlando Letelier, the former Chilean ambassador to the United States, and his secretary, Ronni Moffitt. The two were killed on September 21, 1976, in Washington, D.C., when the car in which they were driving exploded as a result of the detonation of a bomb which had been placed under the driver's seat. Investigations into the murders were conducted by, among others, the Federal Bureau of Investigation ("FBI"), the Federal Aviation Administration ("FAA"), and the United States House of Representatives Subcommittee on Government Activities and Transportation.

The FBI investigation culminated in indictments against nine individuals. One, Michael Vernon Townley, a United States citizen employed by Direccion de Intelligencia Nacional ("DINA"), the Chilean intelligence agency, pled guilty to conspiracy to murder a foreign official. Three of the defendants were tried and convicted, but the convictions were reversed on appeal,[1] after which, upon retrial, the jury acquitted. The remaining five defendants could not be tried because either Chile refused to extradite them or the FBI was unable to apprehend them.

---

[1]The opinion of the Court of Appeals for the District of Columbia, *United States v. Sampol,* 636 F.2d 621 (D.C.Cir.1980), contains a lengthy description of the evidence adduced at trial concerning the Letelier assassination.

The present action, a civil suit against the Republic of Chile, Townley, and the other defendants in the criminal action, was commenced in November, 1978. The complaint alleged that the individual defendants, acting at the direction and with the assistance of the Republic of Chile, caused the deaths of Letelier and Moffitt. None of the defendants answered the complaint, and defaults were entered against them. Subsequently, the Republic of Chile sent a "diplomatic note" and a memorandum of law to the Clerk of the Court via the Department of State, urging that the court lacked jurisdiction over Chile under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* ("FSIA"). Despite what the court described as Chile's "unorthodox" means of communication with the court, the default was reopened to consider the jurisdictional arguments. After thorough analysis of the language and history of the FSIA, Chile was found amenable to jurisdiction under § 1605(a)(5) which allows the exercise of jurisdiction against foreign states "in any case . . . in which money damages are sought against a foreign state for personal injury or death . . . occurring in the United States and caused by the tortious act or omission of that foreign state." 488 F.Supp. 665, 669 (D.D.C.1980) (Green, J.).

Under § 1608(e) of the FSIA, a judgment by default may not be entered against a foreign state unless "the claimant establishes his claim or right to relief by evidence satisfactory to the court." Accordingly, after the finding of jurisdiction was made, a hearing was held to allow for the submission of evidence to establish the plaintiffs' right to relief. No appearance was made by Chile. After reviewing the evidence, particularly Townley's testimony at the criminal trial, Judge Green concluded that it satisfactorily established that

> "employees of the Republic of Chile, acting within the scope of their employment and at the direction of Chilean officials who were acting within the scope of their office, committed tortious acts of assault and battery and negligent transportation and detonation of explosives that were the proximate cause of the deaths of Orlando Letelier and Ronni Moffitt."

502 F.Supp. 259, 266 (D.D.C.1980). A default judgment was accordingly entered against Chile.

LAN, the garnishee-respondent on the present application, is a commercial airline wholly owned by the Republic of Chile. It has not been named as a defendant. No findings were made by Judge Green as to its role, if any, in the assassinations, with the exception of the observation that "[u]ncontradicted testimony demonstrated that facilities and personnel of LAN . . . were used by Townley in connection with the preparation and carrying out of the assassination." 502 F.Supp. at 262.

However, inquiry was made into LAN's role by the House of Representatives Subcommittee on Government Activities and Transportation, whose findings are contained in a report entitled "Alleged Violations of U.S. Aviation Laws and Regulations by LAN Chile Airlines," H.R.Rep. No. 1157, 96th Cong., 2d Sess. (1980) ("The Report"). The Report was based on a hearing at which the subcommittee heard testimony from the FBI, the United States Attorney's Office, the Department of State, the FAA, the Civil Aeronautics Board ("CAB"), and a representative of LAN, Fernando Cruchaga, the assistant station manager of LAN's Kennedy International Airport office at the time of the assassination. In addition the subcommittee examined the transcripts of the criminal pro-

ceedings and the FAA and CAB's records concerning the events in question.

In the section of the Report entitled "The Relationship Between LAN Chile Airlines and the Letelier Assassination," the following points were made:

1. "[O]n numerous occasions LAN Chile Airlines was used by the assassins in ways which were illegal, and which created a serious threat to the safety and security of LAN Chile passengers and cargo." (Report at 4).

2. "In order to carry out the assassination, Townley (who was in Chile) had made arrangements to work with members of the Cuban Nationalist Movement ("CNM") in the United States . . . . Townley forwarded . . . plastic explosives and . . . TNT to the CNM via LAN." (*Id.*)

3. "[T]he CNM sent Townley . . . paging devices which he modified to serve as remote control detonation for explosives which he later shipped back to the CNM. The paging devices were shippped to and from Chile via LAN . . ." (*Id.*).

4. Townley flew to the United States via LAN on September 8, 1976, on a ticket issued under an alias, carrying "a substance which the FBI believes was lead trinitroresorcinate, a highly volatile, unstable, primary explosive, and several flash caps (used to ignite explosives)." (Report at 5).

5. Townley met with other DINA agents and a LAN employee on September 9, 1976, in the LAN VIP lounge, and "arranged . . . to rent a car for them in New York under a false name." (*Id.*).

6. After placing the explosives in Letelier's car, Townley was unable to return to Chile under the alias by which he

entered the country, so he "approached a LAN Chile pilot, Ronald Berger, who used his internal account to arrange for the issuance of a new ticket under . . . another of Townley's fictitious identities." (*Id.*).

7. "LAN Chile personnel participated in a number of currency transactions that were undertaken in order to pay off various participants in the assassination scheme." (*Id.*)

Additional information concerning Townley's use of LAN in connection with the assassination is contained in the testimony of Townley at the criminal trial (Exhibit A to Affidavit of John Privitera in support of the motion), the testimony of Fernando Cruchaga, LAN's former assistant manager at the Kennedy International Airport facility, before the grand jury which indicted Townley and others (Exhibit B to Privitera Affidavit), and an interim FBI report on LAN's role in the assassination, dated January 25, 1980 (Exhibit C to Privitera Affidavit).

I.

Before delving into the parties' arguments, it is appropriate to review the present posture of the case. First, the current application is an attempt to execute on a judgment. Chile litigated the question of the trial court's jurisdiction; its arguments were rejected. It was given an opportunity to litigate the merits, but chose to default. No appeal has been taken from Judge Green's decisions.

Second, and of equal importance, the defendant in this action is the Republic of Chile, not LAN. LAN was never served with process in this action, and had no opportunity to offer evidence or cross-examine witnesses before Judge Green. Althugh LAN's activities and personnel have been the subjects of Congressional and FBI investigations, no

findings against LAN have been made by a court of law in connection with the events out of which this action arose.

LAN argues that it is a separate juridical entity from the Republic of Chile and not liable for the Republic's debts. It asserts that the judgment creditors have made no showing which would warrant piercing the corporate veil between LAN and the Republic; and that the evidence proffered linking LAN to the assassination is hearsay, lacking in trustworthiness, and even if credited, of little probative value. Moreover, LAN argues that even if it could be deemed liable on Chile's debt, the FSIA bars execution on LAN's assets. Finally, LAN contends that execution on LAN's assets to satisfy a judgment against Chile would violate LAN's right to due process of law, because LAN was not a party to the action in which liability was found.

The judgment creditors respond that LAN, as a wholly-owned subsidiary of Chile, is simply an asset of the Republic, and that, as judgment creditors of the Republic, they can levy on any of the Republic's assets. In the alternative, the judgment creditors assert that they are entitled to pierce the corporate veil and reach LAN's assets because the evidence produced reveals that, in carrying out the assassination, Chile disregarded LAN's separate status and treated it as an alter ego. With respect to the FSIA, the judgment creditors contend that Chile's interest in LAN is leviable under § 1610(a)(2) which permits execution upon "property . . . used for the commercial activity upon which the claim is based." Finally, the judgment creditors argue that LAN's due process rights are not violated by execution upon Chile's interest in LAN: Chile may, should it choose to do so, use LAN's assets to satisfy a Chilean debt, so LAN cannot complain if Chile is forced to use those assets for the same purpose.

## II.

The question whether a foreign juridical entity may be held accountable for the acts and liabilities of its sovereign parent has been the subject of a recent ruling by the United States Supreme Court in *First National City Bank v. Banco Para El Comercio Exterior de Cuba ("Bancec")*, ____ U.S. ____, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983). The *Bancec* decision is of profound importance to the difficult questions presented here, and bears close analysis.

The *Bancec* action arose from the issuance of an irrevocable letter of credit by First National City Bank ("Citibank") in favor of Bancec, a bank wholly owned by the Republic of Cuba, in August, 1980. Less than a month after the issuance of the letter of credit, Cuba nationalized Citibank's property through forced expropriation. Undaunted, Bancec brought suit on the letter of credit in February, 1961, in federal court in the United States. A few weeks after the filing of the complaint, Cuba dissolved Bancec and transferred its assets to the Cuban Ministry of Foreign Trade and Cuba's central bank, Banco Nacional de Cuba. Within the week, the assets were again transferred to another government entity, referred to as Empresa, and from it to the current holder, yet another juridical entity, referred to as Cubazucar. Cubazucar is a Cuban "trading company" which is apparently still in existence. *Id.* at ____, 103 S.Ct. at 2594. A motion to substitute Cubazucar as plaintiff was denied by the district court because of concerns that it would further complicate the litigation.

Citibank admitted liability on the letter of credit. However, it sought to set off, against its liability, Cuba's liability to it for the assets seized in the nationalization. Bancec argued that both it and Cubazucar were separate

juridical entities, and could not be held responsible for any liability that Cuba might have to Citibank.

The Court ruled that there is a presumption that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at ____-____, 103 S.Ct. at 2600. However, the presumption may be overcome when, applying "internationally recognized equitable principles," it is necessary to do so to avoid injustice. *Id.* at ____, 103 S.Ct. at 2603. The Court found that the presumption was overcome in *Bancec* because Bancec's assets had devolved upon the Cuban Ministry of Foreign Trade, making Cuba the real beneficiary of any recovery. "Giving effect to Bancec's separate juridical status in these circumstances, even though it has long been dissolved, would permit the real beneficiary of such an action, the . . . Republic of Cuba, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of Citibank's assets . . ." *Id.* Nor was the Court persuaded by the fact that Bancec's assets had been, since 1962, owned by Cubazucar, another independent juridical entity: "To hold otherwise would permit governments to avoid the requirements of international law simply by creating juridical entities whenever the need arises." *Id.*

Both parties argue that *Bancec* supports their respective positions. LAN emphasizes the ruling that juridical entities are to be presumed independent, and argues that even if all of the evidence proffered by the judgment creditors were accepted as truth, it would not demonstrate that LAN is an "alter ego" of the Republic. The judgment creditors rely on the ruling that equitable principles control, and urge that, under traditional equitable principles,

Chile's disregard of the separateness of the corporate entity as demonstrated by its abuse of LAN to carry out the assassination suffices to warrant a "piercing of the juridical veil."

If the evidence proferred by the judgment creditors is to be credited, and we defer momentarily the question of the admissibility and weight of the proofs submitted, it indicates that Chile used LAN to carry out the assassination. There is evidence that LAN was used to transport explosives on several occasions, and to assist with currency transactions involved in paying off the co-conspirators. The LAN VIP lounge was used as a meeting place for the co-conspirators, and a LAN pilot used his "internal account" to arrange for Townley to exit the United States under an alias after the assassination. If these events occurred, and we make no finding at this time as to whether or not they did, they constitute significant steps in the conspiracy. If Chile used LAN in these respects, we believe that would constitute a gross abuse of the corporate form.

LAN's argument that even the sum of the facts set forth above does not make LAN an "alter ego" of Chile misses the point. The Supreme Court did not find that Bancec or Cubazucar were "shams" or alter egoes of Cuba; in fact, the Court explictly warned against placing excessive emphasis on such "epithets," *id.* at ____, 103 S.Ct. at 2598, or "mechanical formulas," *id.* at ____, 103 S.Ct. at 2603. Instead, the Court concluded that, under the circumstances presented, it would violate internationally accepted equitable principles to adhere to the corporate form.

We conclude that it would violate similar equitable principles to adhere to the corporate form in the instant action if the facts are as asserted by the judgment creditors. As the record presently stands, the judgment creditors have

made a threshold showing that Chile used LAN to facilitate the events in question. If Chile ignored LAN's separate existence in accomplishing the wrong, it may not now invoke that separate existence in order to deny the injured a remedy.[2]

We turn now to the question of the admissibility and weight of the evidence in the present record. Much of the evidence appears admissible under various exceptions to the hearsay rule. For example, Congressional reports and statements by various government agencies at House hearings are admissible under F.R.E. 803(8)(C) as reports or statements of public agencies setting forth "factual findings resulting from an investigation made pursuant to authority granted by law." However, the Rule explicitly provides that such statements are inadmissible if "circumstances indicate lack of trustworthiness." Similarly, LAN assistant manager Cruchaga's testimony before the House is admissible as a statement by LAN's "agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship" under F.R.E. 801(d)(2)(D).

While we consider seriously LAN's contentions that the House Report and Hearings are lacking in trustworthiness,[3] we believe that the "[j]ustification for the exception [—] the assumption that a public official will perform his duty properly," Advisory Committee Notes to Exceptions

---

[2]Surely the equitable principle involved here is at least as strong as that invoked by the Court in *Bancec*, where the only connection with the central government of Cuba was a period of less than a week during which Bancec's assets passed through the Cuban Ministry of Foreign Trade.

[3]LAN argues that the House Report is not based on first-hand knowledge, and that the information on which it is based is of dubious credibility.

803(8) – must be particularly strong in the case of the report of a subcommittee of the United States House of Representatives, and that a substantial showing must be made to support the contention that "circumstances indicate lack of trustworthiness."

In any event, the record as it stands is inadequate to prove either that Chile did intentionally use LAN to facilitate the assassination or that it did not. While the showing against Chile is considerable, in a matter of this significance a more fully developed record is appropriate, if not essential. The applicable rules provide the means for discovery in aid of execution.[4]

It should be emphasized that if Chile failed to comply with the judgment creditors' relevant and reasonable discovery demands, and, in effect, defaulted on this second "bite at the apple," the judgment creditors would be entitled to invoke the ordinary rules of evidence and the sanctions provided in Fed.R.Civ.Pr. 37(b).

III.

As an alternative theory, the judgment creditors argue that, without a showing that would warrant piercing the corporate veil, a judgment creditor is entitled to levy on any assets of its judgment debtor, including corporate shares. Should the judgment debtor be the sole owner of a corporation, the creditor could levy on all of the shares and then liquidate the company. If the shares are secreted, judgment creditors assert, the creditor should be allowed

[4]Rule 69, Fed.R.Civ.Pr., provides that "[i]n aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person . . . in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held."

to reach the assets directly. Here, where Chile's ownership in LAN is not represented by shares, the judgment creditors argue that the same principle applies.

LAN argues that the assets of a corporate entity are not subject to execution unless the requirements for piercing the corporate veil are met. Even if such requirements were met here, LAN continues, LAN is not a state-owned corporation analogous to a wholly-owned American subsidiary company; rather, it is an independent juridical entity.

The judgment creditors are correct that under New York law, a judgment creditor may satisfy his judgment by levying on shares of stock owned by the judgment debtor. *Claude Neon, Inc. v. Birrell,* 177 F.Supp. 706, 711 (S.D.N.Y.1959). A court will order the debtor, or his transferee if the shares have been transferred, to "turn over" the shares to the judgment creditor. *Clarkson Co. Ltd. v. Shaheen,* 540 F.Supp. 636 (S.D.N.Y.1982); *Jack London Productions, Inc. v. Samuel Bronston Productions, Inc.,* 22 A.D.2d 870, 254 N.Y.S.2d 3978 (1st Dept.1964); *Udell v. Udell,* 82 Misc.2d 882, 370 N.Y.S.2d 426 (N.Y.C.Civ.Ct.1975).

However, allowing execution on LAN's assets under this theory alone, without any further proof, ignores the *Bancec* analysis of the role of government instrumentalities. After a discussion of the importance to governments, particularly governments of developing countries, of the presumption of separate juridical entities, the Court states:

> "Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy the claim against a sovereign, and might thereby cause third parties to hesitate before extending credit

> to a government instrumentality without the government's guarantee."

____ U.S. at ____, 103 S.Ct. at 2600. Acceptance of the judgment creditors' "equitable ownership" theory would "result in substantial uncertainty over whether an instrumentality's assets [may] be diverted to satisfy [a] claim against the sovereign," and, accordingly, the theory must be rejected in the circumstances of this case.

## IV.

Having determined that, on an appropriate showing, LAN's assets may be levied upon as Chile's to satisfy the present judgment, the question remains whether execution against Chile's assets is permissible under the FSIA, 28 U.S.C. § 1602 *et seq.* The FSIA, enacted in 1976, provides that unless the action is within one of the specified exceptions, a foreign sovereign is immune from the assertion of federal and state jurisdiction. Sections 1605-1607 set forth the circumstances under which immunity is lifted for purposes of liability; sections 1610-1611 enumerate the circumstances in which assets of a foreign sovereign are without immunity from attachment or execution to satisfy a judgment. Sections 1610-1611 are more limited than sections 1605-1607; that is, only certain assets of a foreign sovereign may be levied upon to satisfy a judgment which is validly entered under 1605-1607.

The judgment creditors argue that they may execute upon Chile's interests in LAN under § 1610(a)(2), which provides:

> "The property in the United States of a foreign state, . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, . . .

> if—: . . . the property is or was used for the commercial activity upon which the claim is based."

It has been established above that LAN's United States assets will be deemed "[t]he property in the United States of a foreign state," Chile, if an appropriate showing is made as set forth in section II of this opinion. Further, it is undisputed that the airplanes on which the judgment creditors seek to execute are "used for a commercial activity in the United States." The applicability and interpretation of the remaining provisions of the section, however, are subject to vigorous dispute.

LAN argues that § 1610(a)(2) is unavailable to the judgment creditors because they secured their judgment under the jurisdictional provision allowing for tort claims, § 1605(a)(5), as opposed to the jurisdictional provision for commercial claims, § 1605(a)(2). In addition, LAN argues that even if § 1610(a)(2) is available to the judgment creditors, its terms are not met because LAN's conduct, even if proven, is not "commercial activity," and, even if it is commercial activity, it is not "the commercial activity upon which the claim is based."

The judgment creditors answer that there is no indication in the statute that § 1610(a)(2) execution was intended to be unavailable for tort claims, and that, in any event, they did not assert jurisdiction solely on the basis of the tort provision, § 1605(a)(5). They further argue that the activities of LAN on which the claim is based are commercial activities – in fact, that they are the standard commercial activities of an airline – providing and assisting with the air transport of passengers and their baggage. In addition, they argue that LAN advocates too narrow an interpretation of the words "upon which the claim was based": the judgment creditors propose that any activity

which was a significant step in giving rise to the cause of action is an activity" upon which the claim is based."

One would be hard pressed to exaggerate the difficulty of interpreting the Foreign Sovereign Immunities Act. As Judge Kaufman recently explained, the statute was deliberately left vague, so as to provide only " 'very modest guidance' on issues of preeminent importance. For answers to these most difficult questions, the authors of the law 'decided to put [their] faith in the U.S. courts.' " *Texas Trading & Milling Corp. v. Federal Republic of Nigeria,* 647 F.2d 300, 302, 303 (2d Cir.1981), *quoting Hearings on H.R. 11315 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary,* 94th Cong., 2d Sess. 53 (1976), *cert. denied,* 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982). One point that does emerge clearly from the legislative history, however, is that the burden of establishing FSIA immunity lies with the party claiming it. H.R.Rep. No. 94-1487, 94th Cong., 2d Sess., reprinted in [1976] U.S.Code Cong. & Admin.News 6604.

A. Are §§ 1610(a)(2) and 1605(a)(5) *"Mutually Exclusive?"*

As noted above, LAN argues that a plaintiff who asserts jurisdiction under the tort section, 1605(a)(5), may not collect on his judgment under § 1610(a)(2), which LAN contends is available only in commercial cases.[5]

[5] It is unnecessary to dwell at length on the judgment creditors' argument that jurisdiction of the action was not based solely on § 1605(a)(5). Judge Green's decision opinion finding jurisdiction discussed only § 1605(a)(5). 488 F.Supp. 665. While it may be that, as the judgment creditors contend, Judge Green focused on § 1605(a)(5) because that was the provision to which Chile's memorandum of law addressed itself, the fairer reading of the opinion is that jurisdiction was found to be available under § 1605(a)(5) without consideration of the other possible bases.

As an initial matter, there is nothing logically inconsistent about the judgment creditors' contention that the same asset can be used simultaneously in both tortious and commercial activity. Any number of activities may be both commercial and tortious, such as, for example, the conduct giving rise to a garden-variety products liability suit. Thus, the fact that Congress indicated in § 1610(a)(2) its intent to permit execution only on commercial assets used for commercial activities does not, by itself, demonstrate an intent to preclude § 1610(a)(2) from being available to satisfy claims grounded in tort, so long as the assets on which the judgment creditor seeks to execute were also used commercially in the activity giving rise to the claim.

LAN is correct that there is a strong verbal similarity between the provision lifting jurisdictional immunity in commercial cases, § 1605(a)(2)[6] and the provision in question, § 1610(a)(2), which lifts execution immunity as to commercial assets. However, the verbal similarity between the two sections is not dispositive because a statute must be read and interpreted as a whole.

In addition to the exception to execution immunity in § 1610(a)(2) for "property used for the commercial activity upon which the claim is based," the statute also excepts from execution immunity a foreign sovereign's assets where the judgment in question established rights to property:

(a) which was taken in violation of international law, § 1610(a)(3);

(b) which was acquired by succession or gift, § 1610(a)(4)(A); or

---

[6]Section 1605(a)(2) provides "A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which the action is based upon a commercial activity carried on in the United States by a foreign state."

(c) which is "immovable," § 1610(a)(4)(B).

A foreign sovereign's assets may also be executed upon if the sovereign has waived its execution immunity, § 1610(a)(1), or, to the extent of its insurance coverage, if the sovereign has taken out a liability insurance policy covering the claim in question, § 1610(a)(5). Nothing in the statute, of course, requires a sovereign to acquire liability insurance.

Viewing the statute as a whole, one notes that, if LAN's interpretation of the statute were correct, a judgment creditor on a tort claim could not execute upon his judgment unless the foreign sovereign magnanimously chose to waive its execution immunity or to take out insurance in order to satisfy possible judgments from which it would otherwise be immune from execution. Having determined to grant jurisdiction in both commercial and tort claims, it appears out of joint to conclude that Congress intended the surprising result of allowing only commercial creditors to execute on their judgments.

While both parties' interpretations of the literal language of § 1610(a)(2) are supportable, we favor the judgment creditors' interpretation because, in the absence of a clear indication of Congressional intent, a statute is not ordinarily interpreted to create a right without a remedy.[7] Accordingly, we conclude that § 1610(a)(2) and 1605(a)(5) are not mutually exclusive.

---

[7]The fact that the statute, as interpreted by LAN, would allow tort creditors to collect on judgments where foreign sovereigns had waived their immunity or taken out insurance in favor of possible claimants is hardly persuasive. Had Congress intended tort victims to be relegated to relying on the munificence of foreign sovereigns, it would have been unlikely to lift sovereign immunity over tort claims. The ordinary assumption is that where one had a legal right to sue, he will have a legal right to collect.

B. *Is LAN's Conduct "Commercial Activity?"*

Section 1610(a)(2) allows for execution only on assets in the "commercial activity upon which the claim is based." The commercial activity on which the judgment creditors rely is LAN's assistance to and transportation of Townley and his lethal equipment. LAN argues that any services it provided to Townley and his cohorts were noncommercial because (a) according to the judgment creditors' view of the facts, the services were provided at the government's behest, which, it is claimed, makes them noncommercial under *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir.1980); and (b) services for which a corporation does not receive compensation are by definition noncommercial. The judgment creditors respond that carriage of passengers and goods is the archetypal commercial activity of an airline, and that the issues whether LAN acted at government direction and whether LAN was compensated go to the reasons for the activity, which, under the statutory language, are not pertinent.

"Commercial activity" is defined by the statute as follows:

> "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, *rather than by reference to its purpose.*"

28 U.S.C. § 1603(d). (Emphasis added). The statutory admonition to look to the "nature of the course of conduct . . . rather than . . . its purpose" firmly supports the judgment creditors' position that the issue is what LAN did, not why they did it.

The question of what constitutes commercial activity

under the FSIA has been the subject of several decisions in this Circuit, the seminal case being *Texas Trading, supra,* in which Judge Kaufman provided the following rule of thumb: "if the activity is one in which a private person could engage, it is not entitled to immunity" as noncommercial activity. 647 F.2d at 309. *Texas Trading* involved Nigeria's breach of a contract to buy cement. The court ruled: "Nigeria's activity here is in the nature of a private contract for the purchase of goods. Its purpose – to build roads, army barracks, whatever – is irrelevant." *Id.* at 310.

Further elaboration of the "commercial activity" concept is provided by *Gibbons v. Udaras na Gaeltachta,* 549 F.Supp. 1094 (S.D.N.Y.1982). *Gibbons* concerned an action against two instrumentalities of the Republic of Ireland that established an office in the United States to encourage American companies to open plants in Ireland. As a defense against claims by American businesses which alleged that they had been fraudulently induced to relocate in Ireland, the entities contended that their activities – arranging government grants, facilitating relations with Irish companies, promoting investment in Ireland – were not "commercial activities," but rather governmental activities, intended, not for profit, but to foster the Irish government's goals. Applying Judge Kaufman's rule of thumb, the court found that the entities were involved in "commercial activity":

> "While it may well be . . . that IDA exists in order to serve a purpose integral to the Irish government's plans . . . the promotional activities that IDA . . . allegedly engaged in here are, *by nature,* no different at all from the promotional activities engaged by a private public relations firm."

549 F.Supp. at 1110 (emphasis in original). See also

*United Euram Corp. v. U.S.S.R.*, 461 F.Supp. 609 (S.D.N.Y.1978) (action of Soviet "concert society" in arranging to send Soviet artists abroad pursuant to American-Soviet cultural exchange agreement is "commercial activity" because the nature of the activity is the sale of services).

Having reviewed the precedent on point in this Circuit, we turn to the cases decided in other circuits upon which LAN relies, in particular, *Arango v. Guzman Travel Advisors Corp., supra,* and *Perez v. The Bahamas,* 482 F.Supp. 1208 (D.D.C.1980), *aff'd* 652 F.2d 186 (D.C. Cir.), *cert. denied,* 454 U.S. 865, 102 S.Ct. 326, 70 L.Ed.2d 166 (1981). *Arango* was a suit by Americans who had signed up for a package vacation tour in the Dominican Republic, but who, upon arrival in Santo Domingo, were forcibly placed back on the airplane by Dominican immigration officials and airline personnel, and sent, against their will, to Puerto Rico. The court held that their claims for false imprisonment and battery involved noncommercial conduct, but that their claim for nonperformances of the package vacation tour was commercial.

The result in *Arango* is entirely consistent with Judge Kaufman's rule of thumb: a private person, acting without government sanction, could not force someone onto an airplane and deport him to a foreign country. Such action is not commercial – it may be criminal. Nor would it be of consequence that the private actor had been paid a fee: kidnapping, if that is what it was, for profit would still be kidnapping.

To the extent that the *Arango* decision turned on the court's view that the activities were noncommercial because performed at the behest of the government, the case is not persuasive. In the first place, such a rationale would

not even be consistent within the *Arango* decision itself: cancellation of the package vacation tour was equally at the behest of the government, yet it was deemed commercial.

More important to deem an activity "commercial" on the grounds that it is performed at the government's behest would be inconsistent with the statute, which requires the court to look at *what* the defendant did, not whether he did it to follow the government's instructions or for any other reason. For that matter, the cancellation of the cement contracts in *Texas Trading* was done at government behest, yet it was deemed commercial activity.

Little additional comment is needed on *Perez v. The Bahamas, supra,* an action arising from the Bahamian marine police shooting at an American fishing boat suspected of violating Bahamian fishing laws. Again, the conduct of the Bahamian police in shooting at a fishing boat is not an activity "in which a private person could engage," *Texas Trading, supra.*

Applying the case law cited above to the circumstances at issue, we concluded that LAN's actions in assisting and transporting Townley are "commercial activity" within the meaning of the FSIA. Transporting and assisting a passenger is an activity in which a private person could engage; LAN's motives are of no relevance on this point.

Nor is it pertinent whether or not LAN received a fee for its various tasks.[8] For the purpose of the statute, noncommercial activity is not converted into commercial activity by the receipt of compensation; a private person cannot shoot at another fishing boat whether he is paid to do so or

[8]The record does not establish whether or not Townley paid LAN.

not. The reverse is also true: commercial airlines routinely assist passengers beyond the requirements of the contract of passage, by, for example, arranging car rentals, allowing them to use airline lounges, and permitting them to carry excess baggage on board the plane. Because such actions are actions "in which a private person could engage," the fact that Townley may not have paid a fee does not make the *nature* of the conduct noncommercial. *See Gibbons v. Udaras na Gaeltachta, supra,* 549 F.Supp. at 1110.

*C. Is LAN's Conduct "The Commercial Activity Upon Which the Claim is Based?"*

LAN argues that the "activity upon which the claim is based" should be interpreted to mean the central or pivotal activity on which the claim is based, which, in this case, is the assassination itself.

The judgment creditors urge a broader reading of the statute: they argue that any activity from which the claim arose may serve as the "basis" of the claim for the purposes of § 1610(a)(2).

No authority has been found on the interpretation of this aspect of § 1610(a)(2). However, several cases have construed the similar phrase, "based upon commercial activity," that appears in FSIA § 1605(a)(2):

> "A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which the action is based upon a commercial activity carried on in the United States by a foreign state."

The courts of this Circuit have given a very broad reading to the question of whether an action is "based upon" a given activity. *Gemini Shipping, Inc. v. Foreign Trade Organization,* 647 F.2d 317 (2d Cir. 1981) (Kauf-

man, J.), was an action by a vessel charterer against the owner of the vessel's cargo for demurrage incurred as a result of a 115-day delay in a Syrian port. The cargo owner had guaranteed that it would pay for all demurrages. The cargo, rice, had been purchased by two Syrian instrumentalities through bids solicited in the United States under the "P.L. 480" food purchase program, 7 U.S.C. 1691 *et seq.* The district court ruled that the claim was not "based upon a commercial activity carried on in the United States by a foreign state" under § 1605(a)(2), because the vessel charterer was not involved in the purchase and sale of the rice, and that there was thus "no nexus between the demurrages and the guarantee thereof and such activities as the plaintiff would ascribe to the defendant occurring in the United States." 496 F.Supp. 256, 258 (S.D.N.Y.1980).

The Court of Appeals rejected the district court's interpretation of the basis of the claim as being too "niggardly." 647 F.2d at 319. The court ruled that the charterer's suit for demurrages was " 'based upon' the commercial activity because the guarantee [for the demurrages] was part and parcel of the rice sale." *Id.*

The Second Circuit has recently affirmed the *Gemini* interpretation of "based upon" in *Ministry of Supply v. Universe Tankships, Inc.,* 708 F.2d 80 (2d Cir.1983) (Friendly, J.). *Ministry of Supply* concerned a complaint by the charterer of a vessel against the Egyptian Ministry of Supply. The charterer alleged that the Ministry had "wrongfully halted the discharge [of the vessel] at Port Said[, Egypt] and thus wrongfully denied [the charterer] its rightful use of the vessel." At 83. The Ministry, like the Syrian instrumentalities in *Gemini,* had purchased the cargo which was on the vessel through the United States P.L. 480 program, which involved actions by the Ministry in the United States. The court found that the Ministry

was subject to jurisdiction under § 1605(a)(2) because the charterer's claim that the Ministry "wrongfully halted the discharge" in Egypt was " 'based upon' [the Ministry's] entire course of activity in arranging in the United States for the purchase of the wheat and its transportation to Egypt, not simply on the acts done (or not done) by [the Ministry] in the course of unloading at Port Said." At 84.

The Third Circuit has taken an even broader view of the "basis" of an FSIA claim. In *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3d Cir.1980), an American traveler claimed that he had been forced to endure 15 hours in a Mexican airport "under extremely brutal conditions" because Aeromexico, from whom he had purchased a ticket, had failed to "exercise due care." The district court held that jurisdiction as to Aeromexico did not lie under § 1605(a)(2) because the action was not based on commercial activity in the United States, but rather a tort in Mexico. The Third Circuit reversed, stating:

> "The record contains . . . information which tends to show a *nexus* between Sugarman's grievance and Aeromexico's commercial activity carried on in the United States."

626 F.2d at 272 (emphasis added). *See also In re Rio Grande Transport, Inc.*, 516 F.Supp. 1155, 1161-62 (S.D.N.Y. 1981) (Pierce, J.) (action on collision between two ships in the Mediterranean sea "based upon a commercial activity carried on in the United States" because the defendant's vessels called regularly at United States ports).

These decisions compel the conclusion that LAN's interpretation of the phrase "activity upon which the claim is based" as including only the central or pivotal activity is too "niggardly," in the words of the Court of Appeals in

*Gemini.* The judgment creditor's claim here is "based upon the entire course of activity," *Ministry of Supply, supra,* at 84, in arranging, facilitating, and carrying out the assassination. The record indicates a substantial "Nexus" between the judgment creditors' grievance and LAN's commercial activity. *See Sugarman v. Aeromexico, supra,* at 272.

For the reasons stated above, we conclude that § 1601(a)(2) lifts execution immunity from LAN and the Republic of Chile in the circumstances of this case.

V.

LAN's final argument is that permitting execution against its assets to satisfy Chile's liability would violate due process because LAN had no opportunity to defend on the merits against the judgment creditors' claim. This position has been implicitly rejected by the discussion above concerning piercing the corporate veil; that is, if internationally recognized principles of equity require the piercing of the corporate veil, it follows that general notions of due process are not thereby offended.

Moreover, if due process precluded execution on LAN's assets, it would equally have precluded the result in *Bancec.* To reiterate briefly, Citibank was permitted to assert against Bancec a debt owed to Citibank by the Republic of Cuba, although Bancec was not a party to any proceedings adjudicating the liability of Cuba to Citbank. We are confident that the Supreme Court would not have allowed Citibank's set-off against Bancec had it violated Bancec's due process rights, and we see no basis for distinguishing LAN's position in this respect from Bancec's.

*Conclusion*

As we have observed above, the record is incomplete as to whether Chile's conduct was such that, under the analysis of Section II, *supra,* it would warrant disregarding LAN's separte juridical status. Accordingly, decision on the application is reserved pending submission of a more fully developed record.[9] It bears repeating that, should Chile default on its obligations to produce pertinent witnesses and documents, the ordinary presumptions against a party that fails to produce evidence could be invoked.

It is so ordered.

---

[9]It is unnecessary to reach, at this time, the question whether appointment of a receiver is the appropriate mechanism for execution on this judgment. However, there appears to be considerable merit to the judgment creditors' approach. *See generally,* 6 New York Civil Practice, J. Weinstein, H. Korn, & A. Miller, ¶ 5228.04 (1982 ed.) (standards for appointment of a receiver).

## APPENDIX C

**Isabel Morel De LETELIER, Michael Maggio, as personal representative of Orlando Letelier, Christian A. Letelier, Jose I. Letelier, Francisco J. Letelier, Juan Pablo Letelier, Michael Moffitt, individually, and as personal representative of Ronni Karpen Moffitt, Murray H. Karpen, and Hilda Karpen, Judgment Creditors,**

**v.**

**The REPUBLIC OF CHILE, also doing business as Linea Aerea Nacional-Chile, Judgment Debtor,**

**and**

**Linea Aerea Nacional-Chile, Garnishee-Respondent.**

**No. M18-302.**

United States District Court,
S.D. New York.

Dec. 21, 1983.

---

Tigar & Buffone, Washington, D.C. (Michael E. Tigar, John J. Privitera, Washington, D.C., of counsel), Donovan, Leisure, Newton & Irvine, New York City (William J.T. Brown, Joseph P. Cyr, New York City, of counsel), for Judgment Creditors.

Hale, Russell & Gray, New York City, for Judgment Debtor; Thomas F. Engel, New York City, Gerald D. Morgan, Jr., Washington, D.C., Carter K. Combe, Karen Gross, New York City, of counsel.

LASKER, District Judge.

On July 28, 1983 this Court filed an opinion reserving decision on the motion by the personal representatives and

survivors of Orlando Letelier and Ronni Moffitt ("judgment creditors"), pursuant to Fed.R.Civ.Pr. 69 and N.Y.C.P.L.R. § 5228, for the appointment of Michael Moffitt as receiver of the property interests of the Republic of Chile in the Chilean national airline, Linea Aerea Nacional-Chile ("LAN-Chile").[1] In that opinion it was held that on an appropriate factual showing of the judgment creditors would be entitled to levy upon LAN's assets as Chile's to satisfy the judgment obtained against Chile on November 7, 1980 in the United States District Court for the District of Columbia.[2] The earlier opinion reviewed the record as developed up to that time, and observed that while judgment creditors had made a considerable showing in support of their motion, further development of the record was appropriate in a matter as significant as the one at hand. It was stated that

> "It should be emphasized that if Chile failed to comply with the judgment creditors' relevant and reasonable discovery demands, and, in effect, defaulted on this second "bite at the apple," the judgment creditors would be entitled to invoke the ordinary rules of evidence and the sanctions provided in Fed.R.Civ.Pr. 37(b)."

567 F.Supp. at 1497.

On October 7, 1983 the judgment creditors served discovery requests, including interrogatories, document requests, and requests for admission, on the Republic of

---

[1] 567 F.Supp. 1490 (S.D.N.Y.1983).

[2] *See* 502 F.Supp. 259 (D.D.C.1980); 488 F.Supp. 665 (D.D.C. 1980).

Chile.[3] The discovery requests covered the subject of, *inter alia,* the pov[illegible] and control exercised by the Republic of Chile over LAN-Chile assets and facilities, and the use (if any) which the Republic of Chile made of LAN-Chile in connection with the assassination of Orlando Letelier and Ronni Moffitt. The Republic of Chile has neither interposed objections to the discovery requests as permitted by the Federal Rules of Civil Procedure, nor complied with the discovery requests. Through diplomatic notes filed with this Court by the Department of State, the Republic of Chile has asserted that it does not recognize the validity of the default judgment entered against it in the District of Columbia, nor does it recognize the jurisdiction of this Court in the instant supplementary proceeding.

In view of the Republic of Chile's failure to respond to judgment creditors' discovery requests, the judgment creditors now renew their motion for the appointment of a receiver and other relief. The question for present determination is whether the record established thus far, together with the adverse inferences reasonably to be drawn, from the Republic's failure to respond,[4] entitles the judgment creditors to the relief they request.

---

[3] *See* Certificate of Mailing, signed by Raymond F. Burghardt, Clerk of the United States District Court, Southern District of New York, Exhibit F to December 2, 1983 Affidavit of Joseph Cyr, counsel to judgment creditors. ("Cyr Affidavit"). See also Cyr Affidavit, ¶ 10.

[4] *See e.g., Trans World Airlines, Inc. v. Hughes,* 449 F.2d 51, 60-63 (2d Cir.1971), *rev'd on other grounds,* 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577, *reh'g denied,* 410 U.S. 975, 93 S.Ct. 1434, 35 L.Ed.2d 707 (1973).

The decision on that question is influenced also by the fact that LAN-Chile has announced plans to restructure its operations significantly, possibly as early as January 1, 1984.[5] In view of this possibly imminent restructuring judgment creditors have sought an order requiring the posting of a bond by LAN-Chile pending a final determination on their motion for appointment of a receiver. However, since the record is now as complete as it is likely to be, there is no reason for further delay in reaching a final determination on judgment creditors' motion, rather than requiring the posting of a bond while that determination is pending.

The urgency of the situation, and the request for expeditious action which both the judgment creditors and LAN-Chile have urged upon the Court, preclude a detailed recital of the facts of record. However, the Court has reviewed the record originally submitted on the motion for appointment of a receiver,[6] as well as the unanswered discovery requests proponded by judgment creditors to the Republic of Chile. We conclude that the record, and the adverse inferences to be drawn from the Republic's failure to respond, fully support the fact-findings set forth in the proposed order submitted by judgment creditors, both as to the control and power exercised over LAN-Chile's assets by the Republic of Chile, and the Republic's use of LAN-Chile in carrying out the assassination at issue in the

---

[5] *See* Transcript of Hearing, December 19, 1983.

[6] Copies of the submissions made in connection with the proceedings leading up to the July 28 decision have remained on file in chambers to date.

underlying action.[7] Accordingly, judgment creditors are entitled to entry of an order appointing a receiver so that the judgment obtained against the Republic may be satisfied.

In recognition of the fact that the appointment of a receiver may be prejudicial to LAN-Chile's operations, it is appropriate to stay the order directing such appointment for a reasonable time to permit LAN-Chile to obtain a bond in lieu of submitting to receivership. We do not agree with LAN-Chile's argument that a bond for the full amount of the judgment with interest is not appropriate. LAN-Chile's own submissions, including the affidavit of Guillermo Goldberg, General Manager of LAN-Chile for North America, establish that restructuring of LAN-Chile's operations is being sought because of the airline's worsening financial situation. No assurance has been made to the Court that judgment creditors' ability to satisfy their judgment against the assets of LAN-Chile will not be prejudiced by the restructuring being contemplated.[8]

LAN-Chile argues that no bond should be required in excess of its United States assets, which it asserts are less in value than the $2.9 million judgment. The argument is misplaced, however, because the purpose of the bond is not to secure a judgment against LAN-Chile, – indeed there is no judgment against LAN-Chile – but against the Republic of Chile.

---

[7]Contrary to LAN-Chile's argument, nothing in this Court's opinion of July 28, 1983 prevented judgment creditors from seeking discovery as to the Republic's control of LAN-Chile assets as well as its use of LAN-Chile in the assassinations.

[8]At best, Goldberg's Affidavit (dated December 7, 1983) states that "it is likely" that the restructuring would not call for the transfer of LAN-Chile's U.S. assets to any new entity created. ¶ 5.

Accordingly, judgment creditors' motions for sanctions pursuant to Rule 37 and for appointment of a receiver have been granted by order of this Court dated December 20, 1983.[9]

---

[9]The order was filed yesterday in advance of the filing of this memorandum, in order to permit LAN-Chile to proceed with an appeal.

## APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 4th day of January one thousand nine hundred and eighty-four.

---

ISABEL MOREL DE LETELIER, et al.,
Judgment Creditors-Appellles,
v. 83-9048
THE REPUBLIC OF CHILE, also doing business as LINEA AEREA NACIONAL-CHILE,
Judgment Debtor,
and
LINEA AEREA NACIONAL-CHILE,
Garnishee-Appellant.

---

A petition for rehearing containing suggestions that the action be reheard in banc having been filed herein by counsel for the judgment creditors-appellees, Isabel Morel DeLetelier, et. al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc have [sic] been transmitted to the judges of the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine G. Goldsmith
Elaine B. Goldsmith
Clerk

FILED JAN 4 1985
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
ELAINE B. GOLDSMITH, CLERK

RECEIVED JAN 7 1985
TIGAR & BUFFONE

# APPENDIX E
## STATUTORY PROVISIONS INVOLVED
## (Title 28)

### § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

**Separability of Provisions.** Section 7 of Pub.L. 94-583 provided that: "If any provision of this Act or the application thereof to any foreign state is held invalid the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable."

**Short Title.** Section 1 of Pub.L. 94-583 provided: "That this Act may be cited as the 'Foreign Sovereign Immunities Act of 1976'."

### § 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision therof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

## § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction

of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.
(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

**§ 1605. General exceptions to the jurisdictional immunity of a foreign state**

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchange for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by success or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any offiical or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to–

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interfererence with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided,* That–

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit – unless the party was unaware that the

vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(C) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b)(1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the state such party determined the existence of the foreign state's interest.

Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: *Provided,* That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

## § 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by

the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

(Added Pub.L.94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2894.)

**§ 1610. Exceptions to the immunity from attachment or execution**

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the exeuction relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided,* That such property is not used for purposes of maintaining a diplomatic or consular

mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if–

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2896.)